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## Water and sanitation services in Europe: do legal frameworks provide for "good governance"?

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The background of the slide is a grayscale photograph of a hand cupped together, holding water. The water is splashing and creating a dynamic, textured effect. The hand is positioned in the center, with fingers slightly curled. The overall tone is artistic and evocative, emphasizing the theme of water.

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# Water and Sanitation Services in Europe

Do Legal Frameworks provide for  
“Good Governance”?

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Dr Mónica García Quesada

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May 2011

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Centre for Water Law, Policy and Science  
University of Dundee

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## **ABOUT THIS REPORT**

This report has been written by Monica Garcia Quesada, a Research Fellow at the UNESCO Centre for Water Law, Policy and Science, University of Dundee (United Kingdom). The contributions of Sarah Hendry, Patricia Wouters, Michael Hantke Domas and Maria Pascual to this research are gratefully acknowledged. At the UNESCO Centre, the author is thankful to Dinara Zigashina, Hugo Tremblay, Jing Lee, Mohamad Mova Al'Afghani and Armelle Guignier for their suggestions at different stages of the analysis. The research assistance of Charlotte Herman, Teresa Liguori and Pietro Baldovin is also greatly appreciated.

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author should be informed of any use made of their work. No use of this publication may be made for commercial purposes.

## ACRONYMS

ATO: Ambiti Territoriali Ottimali (*Optimal Territorial Areas*)  
 CADA: Commission d'Accès aux Documents Administratifs (*Commission for Access to Administrative Documents*)  
 CCWater: Consumer Council for Water  
 CGCT: Code général des collectivités territoriales (*General Code of Territorial Collectivities*)  
 Co.N.Vi.RI.: Commissione Nazionale di Vigilanza sulle Risorse Idriche (*National Commission for Monitoring Water Resources*)  
 DEFRA: Department for Environment, Food and Rural Affairs  
 DWI: Drinking Water Inspectorate  
 DWQR: Drinking Water Quality Regulator for Scotland  
 EA: Environment Agency  
 EU: European Union  
 OECD: Organisation for Economic Cooperation and Development  
 OFWAT: Water Service Regulation Authority  
 SDAGE: Schémas Directeurs d'Aménagement et de Gestion des Eau (*Directing Plans for Development and Management of Water*)  
 SEPA: Scottish Environment Protection Agency  
 T.A.R.: Tribunale Amministrativo Regionale (*Regional Administrative Court*)  
 UNECE: United Nations Economic Commission for Europe  
 VEWIN: Vereniging van Waterbedriven in Nederland (*Association of Dutch Water Companies*)  
 WaSCs: Water and Sewerage Companies  
 WICS: Water Industry Commission for Scotland

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## INTRODUCTION

Water is life – and yet not everyone has safe and secure access to this finite resource. Over 1.1 billion people worldwide lack access to safe drinking water and around 2.6 billion people have no access to adequate sanitation.<sup>1</sup> This situation is estimated to cause more than five million deaths each year from water-related diseases, mostly preventable.<sup>2</sup>

The current global water crisis is widely considered a crisis of governance and not of scarcity: insufficiency of water, particularly for drinking water supply and sanitation, is primarily caused by inefficient management, corruption, and lack of appropriate institutions, rather than by water shortages.<sup>3</sup> The United Nations and other relevant institutions claim that lack of *governance* is one of the big obstacles to improved access to water supply and sanitation.<sup>4</sup> Improved

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<sup>1</sup> UNESCO World Water Assessment Programme, "The Millennium Development Goals and Water," [http://www.UNESCO.org/water/wwap/facts\\_figures/mdgs.shtml](http://www.UNESCO.org/water/wwap/facts_figures/mdgs.shtml).

<sup>2</sup> Ibid.

<sup>3</sup> J Plummer and T Slaymaker, "Rethinking Governance in Water Services," Overseas Development Institute, [http://www.odi.org.uk/publications/working\\_papers/WP284.pdf](http://www.odi.org.uk/publications/working_papers/WP284.pdf). M Solanes and A Jouravlev, "Water Governance for Development and Sustainability," United Nations Economic Commission for Latin America and the Caribbean, <http://www.eclac.cl/publicaciones/xml/0/26200/lcl2556e.pdf>. World Water Assessment Programme, *Water: A Shared Responsibility (the United Nations World Water Development Report 2)* (Paris: UNESCO - Berghahn Books, 2006), Global Water Partnership, "Towards Water Security: A Framework for Action," (Stockholm and London: Global Water Partnership, 2000).

<sup>4</sup> UNDP, "Water Governance for Poverty Reduction: Key Issues and the Undp Response to Millenium Development Goals," UNDP, World Water Assessment Programme, *Water: A Shared Responsibility (the United Nations World Water Development Report 2)*. J Winpenny, "Financing Water for All: Report of the World Panel on Financing Water Infrastructure Chaired by Michel Camdessus," Global Water Partnership, World Water Council, and Third World Water Forum, [http://www.worldwatercouncil.org/fileadmin/wwc/Library/Publications\\_and\\_reports/CamdessusSummary.pdf](http://www.worldwatercouncil.org/fileadmin/wwc/Library/Publications_and_reports/CamdessusSummary.pdf), UNESCO, "Water for People Water for Life: The United Nations

governance is argued to be essential to provide for better water services, especially in the current context of population growth, increasing water demands and global climate change.

The Global Water Partnership defines 'water governance' as "the range of political, social, economic and administrative systems that are in place to develop and manage water resources, and the delivery of water services, at different levels of society".<sup>5</sup> Thus, the term alludes, first, to all measures to regulate, allocate and control the quality of all water resources in a country. But, in addition, water governance refers also to the mechanisms to manage the delivery of water services - water supply and sanitation. While aware of the strong linkages between managing water resources and the provision of water services, this report exclusively deals with the governance mechanisms for delivering water as a service, and not for managing water as a resource.

The present study examines the national legal frameworks of six European countries to analyse whether, and to what extent, they provide for effective governance in water services provision. It argues that, although governance deficits have been recurrently put forward as a cause contributing to the current world water crisis, insufficient is known of what constitutes good governance practices. To overcome this limit, this research argues that the concept of governance should be best analysed by focusing on its constituent elements, which help to evaluate the functioning of the different governance mechanisms in diverse regulatory settings.

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World Water Development Report," ed. United Nations World Water Assessment Programme (WWAP) (UNESCO and Berghahn Books, 2003).

<sup>5</sup> Peter Rogers and Allan W Hall, "Effective Water Governance," in *TEC Background papers n 7* (Global Water Partnership Technical Committee, 2003), 16.

Water governance is a function of three principles: transparency, public participation and access to justice. Governance mechanisms allow **water customers to be informed, to take part in the decision-making process and to have the right to an expeditious redress procedure before the judiciary or administrative authorities**. Analysing water governance in water services involves the identification, in a systematic way, of the regulatory and institutional provisions that facilitate the formulation and application of these principles in different regulatory frameworks. The present study has developed an analytical approach to do so.

The subsequent chapters proceed in the following way. Chapter 1 examines the concept of water governance. It analyses the particularities of water services and the objectives and challenges of water regulation. The challenges that political authorities face to overcome the difficulties for economic regulation in this sector are examined, as well as how they have dealt with these inefficiencies. The solutions concerning the ownership of the service are analysed first, focusing in particular on *public ownership* and *economic regulation*. Subsequently, the chapter focuses on the alternatives relating to the management of the service— *direct* and *delegated* water service provision. The rationale for each solution, along with its challenges, is examined. The chapter subsequently examines the meaning of governance principles, focusing on transparency, participation and access to justice, as well as on their applicability to water sector regulation.

Chapter 2 introduces the analytical framework and the methodology of the research. The framework for analysing water governance is based on a set of 14

governance indicators on transparency, participation and access to justice that will be employed to examine water governance from a cross-national perspective. To allow for a comprehensive account of governance in water services provision in Europe, the research has chosen England, France, Italy, the Netherlands, Scotland and Spain as country cases that represent different national responses to water sector regulation. The research assesses and compares whether existing legal frameworks of the countries support the three elements of governance.

Chapter 3 provides an overview of the European Union legislation that defines both substantial and procedural standards for policy making in all EU Member States. The content of the principal EU water directives is explained, focusing on the environmental and quality requirements that they introduce. In addition, the chapter analyses the substance of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention), which has been signed by the EU. This convention has prompted the adoption of EU legislation regulating the procedures to involve water users in environmental policy-making in all EU Member States. Together, these legal texts have created minimum standards that all EU Member States need to transpose into national legislation, and with which they have to comply.

Chapters 4 to 9 analyse water governance in six European states focusing, respectively, on England, France, Italy, the Netherlands, Scotland and Spain. All chapters follow a similar structure. They are divided into two parts, with the first part providing a contextual analysis of the main national institutions in charge of providing water services, an overview of the main legal norms

that regulate the water service sector and an analysis of the price and customer service standards setting process. The second part analyses the degree of transparency, participation and access to justice according to the indicators developed in Chapter 2.

The final chapter bring together the findings of the previous six chapters. It goes back to each of the criteria for water governance identified in chapter 2 and compares the results of the country cases of chapters 4 to 9. Lessons drawn from the research and aspects that deserve further attention in research are finally discussed.

## **CHAPTER 1.**

### **WATER SERVICES AND SANITATION IN EUROPE: DO LEGAL FRAMEWORKS PROVIDE FOR GOOD GOVERNANCE?**

#### **1. INTRODUCTION**

This chapter reviews the literature on governance and discusses the relevance of water services provision as an area for analysis. The aim of the chapter is threefold. First, it examines the development of the concept of governance. It shows that the term evolved to account for the transformations of the role of the state as a service provider, and as synonymous with sound service management. Secondly, it analyses the particular characteristics of water service provision as natural monopoly and a merit good, which makes it deserving special attention in governance research. Finally, it discusses the core elements of governance in water services provision in more detail, focusing on its three main features: (1) access to information, (2) participation and (3) access to justice. The chapter argues that, in order to improve an understanding of governance in water services provision, it is crucial to develop an analytical instrument both to assess the quality of governance in a country and to compare it across different regulatory frameworks. In doing so, the chapter assesses the meaning of governance and its components and develops a common understanding of its main constituent elements. In doing so, the chapter sets the background for developing a research strategy to examine governance in six country cases – focus of Chapter 2.

## 2. DEFINING GOVERNANCE

The 1990s and 2000s have seen the development of analysis and studies about “governance.” Despite being a widely employed term, governance remains elusive to definition and operationalisation. The complex and multifaceted nature of the term governance requires examination to fully understand its character.

Although its origins in the English language can be traced back to the 17<sup>th</sup> or 18<sup>th</sup> century,<sup>6</sup> the use of the term governance spread during the 1990s and 2000s to reflect the existence of new modes of regulation and service provision. Changes have taken place in the regulation of water utilities in the last few years at the national level, which have made necessary to reconsider the role of the state as service provider.<sup>7</sup> The privatisation of services traditionally under the aegis of the state, the development of large international companies and

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<sup>6</sup> William L Megginson and Jeff M Netter, "From State to Market: A Survey of Empirical Studies on Privatization," *Journal of Economic Literature* 39 (2001). See for instance, Joan Corkery, "Introductory Report," in *Governance: Concepts and Applications*, ed. Joan Corkery (Brussels: IIAS Working Group International Institute for Administrative Studies, 1999), 12.

<sup>7</sup> J Jordana and D Levi-Faur, "The Politics of Regulation in the Age of Governance," in *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*, ed. J. Jordana and D. Levi-Faur (Cheltenham: Edward Elgar Publishing Ltd, 2005). In the water sector, see the novel experiences for water governance, such as in Porto Alegre, Brazil. See for instance G Bitran and E Valenzuela, "Water Services in Chile: Comparing Private and Public Performance," <http://rru.worldbank.org/documents/publicpolicyjournal/255Bitra-031103.pdf>, R Martínez-Espiñeira, M García-Valiñas, and F González-Gómez, "Does Private Management of Water Supply Services Really Increase Prices? An Empirical Analysis," Universidad de Granada, <http://www.ugr.es/~teoriahe/RePEc/gra/fegper/FEGWP507.pdf>, N Prasad, "Privatisation Results: Private Sector Participation in Water Services after 15 Years," *Dev Policy Rev* 24, no. 6 (2006).



the internationalisation of regulation are referred to as common causes of the development of new governance structures.<sup>8</sup>

Indeed, the term governance has developed with debates about public sector reform. The rise of neoliberal governments in various democracies in the 1980s supported the view that the state was incapable of delivering efficient public services. Privatisation of services and utilities was a frequent topic in the agenda of reforms of these governments during the 1980s and 1990s. Privatisation, in certain cases, has entailed the transfer of assets from the government into private hands by means of a deliberate sale of the state-owned enterprises – or divestiture. In other cases, privatisation has meant the contract of a private company to provide goods or services previously supplied by public bodies, so the private sector participates in the provision of public goods and services.<sup>9</sup>

Under these new modes of providing public services, the national state was given the role of “steering,” that is, of controlling the performance of private providers of public services. For their part, the private companies became responsible of “rowing,” i.e. providing the service to “customers” – not citizens or service users.<sup>10</sup> In this new context, private companies began to participate in the provision of services that were previously the exclusive responsibility of the state, and so the privatisation of public services challenged the traditional

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<sup>8</sup> Paul Hirst, "Democracy and Governance," in *Debating Governance. Authority, Steering and Democracy*, ed. Jon Pierre (Oxford: Oxford University Press, 2000), 13.

<sup>9</sup> Judith A Rees, "Regulation and Private Participation in the Water and Sanitation Sector," in *TAC Background Papers No. 1* (Stockholm: Global Water partnership/Swedish International Development Cooperation Agency, 2008), 16.

<sup>10</sup> D Osborne and T Gaebler, *Reinventing Government: How the Entrepreneurial Spirit Is Transforming the Public Sector* (New York City: Penguin Books, 1992).

role of the state as service provider. National public property became no longer the most clearly defining aspect of national public service and utility provision, and new modes of governing state affairs came into being.

Along with privatisation, the development of international regulations has also transformed the traditional character of service provision. In Europe, for instance, political organisations such as the European Union have added a new regulatory layer to the existing national regulations. Rules stemming from beyond the nation-state boundaries are having considerable impact in the regulation of national policies. Governance is a term that encompasses new modes of regulating and responding to the challenges created by the new supranational organisations.<sup>11</sup>

Equally challenging has been the intensification of the role of transnational private companies operating in an increasingly globalised economy. The term governance encompasses the development and the intensified presence of transnational companies in the management of state affairs at the national level. Their increased role in national state affairs established a more complex relationship between businesses and governments.<sup>12</sup>

Thus, governance encapsulates the notion of a system where the responsibility for service provision and regulation is shared between governments, private companies and other actors such as international organisations. Following this

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<sup>11</sup> Giandomenico Majone, "The Regulatory State and Its Legitimacy Problems," *West European Politics* 22, no. 1 (1999), Elke Krahmann, "National, Regional and Global Governance: One Phenomenon or Many?," *Global Governance* 9 (2003).

<sup>12</sup> Donald F Kettl, "The Transformation of Governance: Globalization, Devolution, and the Role of Government," *Public Administration Review* 60, no. 6 (2000).

understanding, governance is considered in the present report as “the system of values, policies and institutions by which a society manages its economic, political and social affairs through interactions within and among the state, civil society and private sector. It is the way a society organises itself to make and implement decisions – achieving mutual understanding, agreement and action. It comprises the mechanisms and processes for citizens and groups to articulate their interests, to mediate their differences and to exercise their legal rights and obligations.”<sup>13</sup>

In the context of these changes of regulatory roles and regimes, two main concerns have been raised by academics and practitioners alike. First, given the existence of new actors and circumstances shaping the provision of services that traditionally were the exclusive responsibility of the state, a central question has been whether these new regulatory regimes are responsive to the preferences of citizens, and how to ensure that appropriate mechanisms to ensure that the new actors are accountable. Thus, the focus of numerous analyses has been how to ensure that governing a country’s resources and the functioning of their institutions are legitimate.<sup>14</sup>

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<sup>13</sup> United Nations Development Programme, "United Nations Development Programme Strategy Note on Governance for Human Development," (2004).

<sup>14</sup> Douglass North et al., "Governance, Growth, and Development Decision-Making," (New York: The World Bank, 2008), 17. Jon Pierre, ed. *Debating Governance. Authority, Steering and Democracy* (Oxford: Oxford University Press, 2000), Hirst, "Democracy and Governance." A Cornwall and J Gaventa, "Bridging the Gap: Citizenship, Participation and Accountability," International Institute for Environment and Development, [http://www.iied.org/NR/agbioliv/pla\\_notes/documents/plan\\_04007.pdf](http://www.iied.org/NR/agbioliv/pla_notes/documents/plan_04007.pdf), Transparency International, "Building Integrity to Ensure Effective Water Governance," in *Policy Position 3* (Berlin: Transparency International, 2008), The Access Initiative, "Citizen Voices in Water Sector Governance: The Role of Transparency, Participation and Government Accountability," [http://www.accessinitiative.org/partnerpages/Interiores\\_CVWS.pdf](http://www.accessinitiative.org/partnerpages/Interiores_CVWS.pdf), C King, "Citizens, Citizenship and Democratic Governance," in *Democracy and Public Administration*, ed. R Box (Armonk, N. Y.: M.E. Sharpe, 2006).

The second area of research has focused on the linkages between governance and economic growth and development.<sup>15</sup> Some academics and international aid organisations have established close linkages between good governance and outcomes such as higher per capita incomes, lower infant mortality and higher literacy outcomes.<sup>16</sup> Good governance has been said to generate mechanisms incentivising the fight against corruption and organised crime and mismanagement, which hamper a country's economic development; a stable and just social order, facilitated by the existence of clear institutional rules and effective and equitable markets, has been argued to help combating poverty and underdevelopment.<sup>17</sup>

Thus, governance studies have given rise to a large and varied research agenda concerned with understanding the nature of these new modes of governing and funding public services provision, as well as with assessing their political, social and economic impact.

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<sup>15</sup> Luis Andres, Jose Luis Guasch, and Sebastian Lopez Azumendi, "Regulatory Governance and Sector Performance: Methodology and Evaluation for Electricity Distribution in Latin America," in *Policy Research Working Paper 4494* (Washington: The World Bank 2008). Dani Rodrik, "Thinking About Governance," in *Governance, Growth and Development Decision Making* (Washington: The World Bank, 2008).

<sup>16</sup> Rodrik, "Thinking About Governance," 17. D Kaufmann, A Kraay, and P Zoido-Lobaton, "Governance Matters," in *Policy paper 2196* (World Bank Institute, 1999), Rogers and Hall, "Effective Water Governance."

<sup>17</sup> The Access Initiative, "Citizen Voices in Water Sector Governance: The Role of Transparency, Participation and Government Accountability.", Transparency International, "Building Integrity to Ensure Effective Water Governance."

### Box 1: Some Key Terms

As national legislation on regulation of water services employs different terminology, the vocabulary in this research follows the International Standards Organisation (ISO) standards to unify some of the main contents. Here are defined the three most recurrent concepts, for clarity<sup>18</sup>.

#### **Responsible body**

The entity that has the overall legal responsibility for providing drinking water or wastewater services to the population in a given geographic area". The responsible body may provide the service directly, or delegate it to an operator that carries the water and setodoerage provision on behalf of the responsible body.

#### **Relevant authority**

Public bodies entitled to set general policies, plans or requirements, or to check compliance with these rules, concerning all the water utilities included in their area of jurisdiction. Depending on the distribution of powers and functions in the country, the relevant authority may be the national government, the regional or the local authorities, or River basin authorities.

#### **Operator**

Person or organization performing day-to-day processes and activities necessary for the provision of the service. Operators can be public - the government is the sole or main shareholder - or private, when the operator's capital is owned by a private society or individual.

### 3. WATER SERVICE PROVISION AS A NATURAL MONOPOLY: OWNERSHIP AND MANAGEMENT

The characteristics of the provision of water services have been subject to an intense debate during the last two decades.<sup>19</sup> The participation of the private sector and the internationalisation of water services provision have become common features of the water sector today, and thus a more complex network

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<sup>18</sup> From United Cities and Local Governments and Suez Environnement, "Role of Local Governments in Water Supply and Sanitation," (United Cities and Local Governments Suez Environnement, 2009).

<sup>19</sup> Jordana and Levi-Faur, "The Politics of Regulation in the Age of Governance."

of actors with conflicting preferences and interests has appeared, making regulation and water provision challenging activities.<sup>20</sup>

Water has particular characteristics as a utility, which justify a special research focus. First, water is not an ordinary commodity: the development and welfare of a country rest heavily on an appropriate supply of safe water and on the provision of adequate sewerage. In addition, water services provision presents important challenges for regulation unknown in other markets.<sup>21</sup> Water has certain characteristics as a resource that make it prone to market failures. Its high sunk costs for abstraction, distribution and collection, its lack of physical homogeneity, the inexistence of a water national grid, etc. require regulation so to yield efficient allocation and use of water resources. The challenges for the regulation of the sector are further explored below.

### **3.1. Water services provision as a Natural Monopoly**

Water services provision is a “natural monopoly”. Natural monopoly is “an industry whose cost function is such that no combination of several firms can produce an industry output vector as cheap as it can be provided by a single supplier.”<sup>22</sup> This situation usually occurs in industries that require large infrastructure investments and benefit from economies of scale, i.e. they face

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<sup>20</sup> William A Maloney, "Regulation in an Episodic Policy-Making Environment: The Water Industry in England and Wales," *Public Administration* 79, no. 3 (2001).

<sup>21</sup> The rules and regulations that set, monitor, enforce and change the allowed tariffs and service standards for water providers', in Eric Groom, Jonathan Halpern, and David Ehrhardt, "Explanatory Notes on Key Topics in the Regulation of Water and Sanitation Services," in *Water Supply and Sanitation Sector Board Discussion Papers Series* (The World Bank Group, 2006).

<sup>22</sup> William J. Baumol, Elizabeth E. Bailey, and Robert D. Willig, "Weak Invisible Hand Theorems on the Sustainability of Multiproduct Natural Monopoly " *The American Economic Review* 67, no. 3 (1977): 350.

decreasing costs for each extra good or service produced.<sup>23</sup> Such is the case of water services provision – the required large sunk investments for operating the infrastructures are calculated to account for nearly 70% of a standard bill.<sup>24</sup> If two or more companies provided the service, the cost of duplicating the infrastructure would outweigh the potential benefits derived from the existence of competition in the water services market.<sup>25</sup> For this reason, water services tend to be provided by only one monopolistic operator.

The existence of a natural monopoly challenges the possibilities of providing water services efficiently. In fact, the natural monopolist, being the only service provider, might be tempted to increase its income at the expense of consumers' income. In absence of competition and regulation, water consumers risk having to pay higher prices for similar services; being captive to monopolistic utility providers, consumers lack the possibility to switch to another provider and thus can be charged at the discretion of the utility.<sup>26</sup>

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<sup>23</sup> K Viscusi, J Vernon, and J Harrington Jr, *Economics of Regulation and Antitrust* (Cambridge, Mass: The MIT Press, 2000). M Katz and H Rosen, *Microeconomics* (Boston, Mass.: Irwin/McGraw-Hill, 1998).

<sup>24</sup> 'The part of the total costs which does not depend on the level of current production. This includes items such as management costs and the cost of plant security.' Taken from John Black, *Oxford Dictionary of Economics* (Oxford: Oxford University Press, 1997), 179.

<sup>25</sup> cfr G Yarrow et al., "Competition in the Provision of Water Services," (London: Regulatory Policy Institute, 2008), I Byatt, "Competition in Water Services: Is the Scottish Model Exportable?" (paper presented at the Hertford Seminar, 2008), T Balance and A Taylor, *Competition and Economic Regulation in Water: The Future of the European Water Industry* (London: IWA Publishing, 2005), P Scott, "Competition in Water Supply," Centre for the Study of Regulated Industries, [http://emp.ac.uk/cr/pubpdf/Occasional\\_Papers/18\\_Scott.pdf](http://emp.ac.uk/cr/pubpdf/Occasional_Papers/18_Scott.pdf), S Cowan, "Competition in the Water Industry," *Oxford Review of Economic Policy* 13, no. 1 (1997).

<sup>26</sup> L Cabral, *Introduction to Industrial Organization* (Cambridge, Mass.: The MIT Press, 2000). Katz and Rosen, *Microeconomics*.

For this reason, countries have developed different regulatory manners of dealing with the monopolistic tendencies of water provision services. Two different sets of solutions are explored - those related to the ownership of the service (public ownership and economic regulation) and those related to the management of the service (direct and delegated service provision). These solutions aim to resolve the natural-monopoly problem, by which the water service provider may be tempted to overcharge water consumers. Depending on who is responsible for providing water services – whether public authorities or private operators – different mechanisms regulate potential excessive profits afforded to service providers.

### 3.2. Ownership of natural monopolies

Two alternatives have been conventionally provided to address the problem of the natural monopoly, referred in the present study as *public ownership* and *economic regulation*. These alternatives give different solutions to the natural monopoly problem by assigning water property rights to, respectively, public authorities and private companies.

The *public ownership* has been the most frequent solution to solve the monopoly problem. It involves the government owning the utilities that provide the service. The assumption behind the decision to adopt the public ownership model is that the public sector pursues *public interest*. Thus, public water enterprises do not earn profits and may even operate at loss<sup>27</sup> – a circumstance that may reflect the achievement of other assigned social goals such as, for instance, water access regardless of ability to pay. Public ownership has been

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<sup>27</sup> N Acocella, *The Foundations of Economic Policy: Values and Techniques* (Cambridge: Cambridge University Press, 1998; reprint, 2000), 240.



the prevalent solution to monopolistic inefficiencies – 95% of water utilities in the world adopt this structure.<sup>28</sup>

However, public ownership has been contested. Some authors believe that lack of profit earning is a problem for achieving efficient publicly-owned companies<sup>29</sup>. Public ownership, it is suggested, makes pricing less efficient, as services tend to be subsidized via public budget, and, consequently, prices do not tend to cover costs.<sup>30</sup> In addition, lack of competition within government reduces the efficiency of the service provision, as no incentives exist for the service utilities to improve their performance. Furthermore, the concept of public interest in regulatory studies has been contested because of its vagueness.<sup>31</sup> In particular, the idea of public servants devoid of personal interest such as power or status has been recurrently questioned.<sup>32</sup>

International agencies, such as World Bank and the Organisation for Economic Co-operation and Development (OECD), have supported the incorporation of the private sector in the provision of water services, as a way of introducing

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<sup>28</sup> Techneau, "Organisation and Financing Models of the Drinking Water Sector: Review of Available Information on Trends and Changes," <http://www.techneau.org/fileadmin/files/Publications/Publications/Deliverables/D1.1.11.pdf>. D Carlton and J Perloff, *Modern Industrial Organization*, Third ed. (Reading, Mass.: Addison-Wesley, 2000), 657. R Posner, *Natural Monopoly and Its Regulation*, 30th anniversary edition with a new preface by the author ed. (Washington, D.C.: Cato Institute, 1999), 107.

<sup>29</sup> cfr D Mueller, *Public Choice II: A Revised Edition of Public Choice* (Cambridge: Cambridge University Press, 1989; reprint, 1997). 266-68

<sup>30</sup> D Newbery, *Privatization, Restructuring, and Regulation of Network Utilities, The Walras-Pareto Lectures* (Cambridge, Mass: The MIT Press, 1999). 98.

<sup>31</sup> cfr M Hantke-Domas, "The Public Interest Theory of Regulation; Non-Existence or Misinterpretation?," *Eur Jnl Law & Econ* 15, no. 2 (2003). M Feintuck, *'the Public Interest' in Regulation* (Oxford: Oxford University Press, 2004; reprint, 2007).

<sup>32</sup> See the rent seeking theory in public choice in Mueller, *Public Choice II: A Revised Edition of Public Choice*.

competition.<sup>33</sup> Competition, it is argued, disciplines inefficient water companies and gives choice to consumers. As a result, according to the World Bank, “government-owned water companies could on average be expected to perform worse than investor-owned companies.”<sup>34</sup> Private utilities are shown to have a positive record on attracting investment,<sup>35</sup> in attaining efficiency gain,<sup>36</sup> enhancing quality of service,<sup>37</sup> and reducing child mortality.<sup>38</sup>

The greatest degree of participation of the private sector in water sector provision is achieved by divestment. “Divestment transfers the ownership of infrastructure assets into private hands, as well as giving the private companies responsibility for all operations, maintenance, revenue raising and investment”. Only one example of full divestment of water service provision has occurred in the world - in England and Wales, following the flotation of the water utilities in 1989. The responsibility for providing the service falls here not on public, but on private corporations. Other types of private-sector involvement have not entailed the divestment of state assets, but exclusively

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<sup>33</sup> M Klein, *Economic Regulation of Water Companies* (SSRN, 1996). Organisation for Economic Co-operation and Development, "Oecd Principles for Private Sector Participation in Infrastructure," (OECD, 2007).

<sup>34</sup> Klein, *Economic Regulation of Water Companies*.

<sup>35</sup> G Bitran and E Valenzuela, "Water Services in Chile: Comparing Private and Public Performance," <http://rru.worldbank.org/documents/publicpolicyjournal/255Bitra-031103.pdf>.

<sup>36</sup> Ibid.

<sup>37</sup> cfr L Sciandra, "Une Évaluation Des Effets De La Privatisation Sur L'accès Aux Ressources En Eau Dans Les Pays En Développement," *Ann Public Coop Econ* 76, no. 2 (2005).. M Garn, J Isham, and S Kähkönen, "Should We Bet on Private or Public Water Utilities in Cambodia? Evidence on Incentives and Performance from Seven Provincial Towns," <http://www.middlebury.edu/services/econ/repec/mdl/ancoec/0219.pdf>. 32

<sup>38</sup> S Galiani, P Gertler, and E Schargrodsky, "Water for Life: The Impact of the Privatization of Water Services on Child Mortality," [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=648048](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=648048). 28

the delegation of the responsibilities for managing the water supply and sewerage services to private operators – they are analysed further below.

Given the difficulties of introducing competition in a natural monopoly industry, divestment has been accompanied by economic regulation, which has aimed to recreate market mechanisms and thus to avoid abusive behaviour from private companies. This is referred to as *economic regulation of a private utility*, and consists in ensuring that price services reflect the cost of providing the service, as they would in a competitive environment.<sup>39</sup> The regulator needs to ensure that the private provider does not abuse its monopolistic position. With this purpose, it gathers and analyses information on the performance of the private operators, and sets maximum prices and service water standards. Yard-stick competition (also known as benchmarking) has been put forward as a mechanism to reproduce capital-market and product-market competition in the absence of market competition.<sup>40</sup> Yardstick competition aims to produce “competition by comparison”, whereby the regulator sets regulatory standards after measuring and comparing the performance of the water providers.

The intervention of private companies in water services provision has been a matter of political friction, both at the national and the international levels.<sup>41</sup>

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<sup>39</sup> Technically, in a competitive environment prices equal marginal cost; thus, a regulator task is to price utilities according to their incremental cost. R Baldwin and M Cave, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford: Oxford University Press, 1999).

<sup>40</sup> S Cowan, "Competition in the Water Industry," *Oxford Review of Economic Policy* 13, no. 1 (1997).

<sup>41</sup> In the European Union, for instance, attempts at pressing liberalisation of the sector have not brought the consensus needed to adopt common legislation. The European Parliament has taken the view that water and waste services should not be subject to Community sectoral directives to liberalise the sector. See the European Parliament, "European

Water is a merit good – that is, a commodity that is estimated worth providing for even if individuals are unwilling or unable to pay for it.<sup>42</sup> Concerns have been raised about the negative impacts of private water sector provision on low-income households, due to the rising prices and the higher levels of disconnections that have followed water privatisation.<sup>43</sup> Some research has provided evidence that private utilities increase prices,<sup>44</sup> target exclusively profitable markets,<sup>45</sup> and may mask their inefficiencies with higher prices.<sup>46</sup> Indeed, only mixed evidence exists on the superiority of private water service provision.

Furthermore, private utilities have faced pointed difficulties to introduce competition and cost-reflective pricing, given the intrinsic biophysical, spatial, and socio-cultural characteristics of water as a resource. In particular, Bakker has pointed to the limits of “commodification” of water.<sup>47</sup> Her examination of

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Parliament Resolution of 13 January 2004 on the Green Paper on Services of General Interest," *A5-0484/2003* (2004).

<sup>42</sup> Judith A Rees, James Winpenny, and Alan W Hall, "Water Financing and Governance," in *TEC Background Papers No.12* (Stockholm: Global Water Partnership, 2008), 18-19.

<sup>43</sup> J. B. (Hans) Opschoor, "Water and Merit Goods," *International Environmental Agreements* 6 (2006).

<sup>44</sup> Bitran and Valenzuela, "Water Services in Chile: Comparing Private and Public Performance." R Martínez-Espiñeira, M García-Valiñas, and F González-Gómez, "Does Private Management of Water Supply Services Really Increase Prices? An Empirical Analysis," Universidad de Granada, <http://www.ugr.es/~teoriahe/RePEc/gra/fegper/FEGWP507.pdf>. Garn, Isham, and Kähkönen, "Should We Bet on Private or Public Water Utilities in Cambodia? Evidence on Incentives and Performance from Seven Provincial Towns."

<sup>45</sup> Martínez-Espiñeira, García-Valiñas, and González-Gómez, "Does Private Management of Water Supply Services Really Increase Prices? An Empirical Analysis." N Prasad, "Current Issues in Private Sector Participation (Psp) in Water Services (Draft)," [http://www.unrisd.org/80256B3C005BCCF9/\(httpPublications\)/99BC5BBB9CA66673C125723A004B92BC?OpenDocument](http://www.unrisd.org/80256B3C005BCCF9/(httpPublications)/99BC5BBB9CA66673C125723A004B92BC?OpenDocument). 28

<sup>46</sup> Acocella, *The Foundations of Economic Policy: Values and Techniques*, 241.

<sup>47</sup> Commodification is “The creation of an economic good through the application of mechanisms intended to appropriate and standardize a class of goods or services, enabling

the divestiture of the water industry in England and Wales highlights the difficulties of developing private property rights, employing markets as allocation mechanisms, and incorporating environmental externalities through pricing to a resource like water.

To face these difficulties, in February 2008 the British government commissioned Professor Martin Cave, a leading expert on the regulation of the water industry, to undertake a Review of Competition and Innovation in the Water Markets. The aim of the Review was to “recommend changes to the legislation and regulation of the industry in England and Wales to deliver benefits to consumers, particularly the most vulnerable, and the environment through greater competition and innovation”.<sup>48</sup>

The Cave Report, published in April 2009, takes a comprehensive review of the UK water market and gives recommendations on possible ways that competition can be promoted in the water market.<sup>49</sup> The report looks at current situation and regulation of abstraction licences, of discharge consents, of the competition in upstream services (such as water and wastewater treatment, sludge treatment and disposal), of retail provision of water service. It also analyses the current industry structure and its incentives for innovative capacity. In this sense, the Cave report has evaluated the existing measures for water sector competition, and proposed improvements to increase the presence

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these goods or services to be sold at a price determined through market exchange”, in Karen Bakker, “Neoliberalizing Nature? Market Environmentalism in Water Supply in England and Wales,” *Annals of the Association of American Geographers* 95, no. 3 (2005): 544.

<sup>48</sup> Martin Cave, “Independent Review of Competition and Innovation in Water Markets: Final Report,” (2009),

<http://www.defra.gov.uk/environment/quality/water/industry/cavereview/documents/cavereview-finalreport.pdf>.

<sup>49</sup> Ibid.

of market instruments for the allocation of water rights, which the government has committed to take forward.<sup>50</sup> Overall, these proposals have shown that, whereas it is possible to introduce measures for competition in the water services market, strong regulation is required to make it possible.

### **3.3. Management of water services provision**

Water services provision may not necessarily be carried out directly by the bodies responsible for the service. Public authorities may decide to appoint a third party, a water operator, to become the organization performing day-to-day processes and activities necessary for the provision of the service. In these cases, whereas the responsibility for providing the service continues to reside with the relevant authority, the water operator undertakes certain agreed functions, such as water abstraction, distribution, collection treatment or disposal.

The terms of the relationship between the operator and the responsible body are usually established by contract. Most commonly, five types of private sector involvement can be established: concession, lease, build-operate-transfer, management contract and service contract – see table below. These different types of contract set out the terms of service, such as the length of the contract and the obligations and rights of the contracting parts.

Whereas much attention has been paid to third-party management by private water companies, there are frequent examples of publicly-owned companies that provide water service. As seen in later chapters, Scotland, the

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<sup>50</sup> Her Majesty's Treasury, "Budget 2009 - Building Britain's Future," (London: The Stationery Office, 2009), 77-78.

Netherlands, and certain local authorities in Spain, Italy and France, are cases where water services provision is carried out by public corporate bodies. In these cases, the relationship between the relevant authority and the public operator can take different forms: it may be regulated by contract between local authorities and water operators (such as in Spain, Italy and France) or by national law (such as in Scotland and the Netherlands).

### **Box 2: Private Sector Involvement<sup>51</sup>**

#### **Concession**

Government lets a long-term contract, usually over 25 years, to a private company, which is responsible for all capital investment, operation and maintenance.

#### **Lease**

Long-term contract (usually 10-20 years). Private sector responsible for operation and maintenance and sometimes for asset renewals. Assets remain in public sector and major capital investment is a public responsibility.

#### **BOT (Build-Operate-Transfer)/ BOO (Build, Operate and Own)**

Contracts are issued for the construction of specific items of infrastructure such as a bulk supply reservoir or treatment plant. Normally the private sector is responsible for all capital investment and owns the assets until transferred to the public sector, but in BOO schemes, private ownership is retained.

#### **Management contract**

Short-term contracts, typically five years. Private firm only responsible for operations and maintenance.

#### **Service contract**

Single function contracts to perform a specific service for a fee, e.g. install meters.

A responsible body, such as a local authority, may decide to delegate a service to a third party for many reasons. First, delegating water service provision has the advantage of introducing expertise and specialisation in the running of a service. Governments may choose to rely on water companies to expand or

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<sup>51</sup> Rees, "Regulation and Private Participation in the Water and Sanitation Sector."

renew the network, to run the service and to introduce new technology, for which specialised technical knowledge might be required. Delegating the service to a specialised operator may help to provide a better and more efficient service. More generally, removing water services functions from the government is seen to ensure that water services provision is carried out away from short-term political intervention and according to technical criteria and specialisation.

In addition, delegating a service to a water operator has been claimed to generate efficiency gains and cost savings.<sup>52</sup> According to supporters, potential costs savings can derive from scale economies of the water provider. Indeed, large-scale water companies may be able to purchase products and materials at lower prices, as well as access to more advantageous financial products. Also, water companies may also derive higher savings from differences in labour practices – such as requiring more work from employees, use the least qualified personnel able to perform each task, and less social protection than employees of the public sector. Finally, competition for contracts generates “competition for the market”.<sup>53</sup> Bidding for contracts provides water companies with incentives to streamline operating and capital expenditure, which may also revert in greater costs savings. In this sense, rivalry amongst competitors for the right to be a monopoly may help to bring costs down and to achieve better standards.<sup>54</sup>

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<sup>52</sup> Philip Keefer, "Contracting Out: An Opportunity for Public Sector Reform and Private Sector Development in Transition Economies," (Washington: The World Bank, 1998), 3, James Ferris and Elizabeth Graddy, "Contracting Out: For What? With Whom?," *Public Administration Review* July/August (1986).

<sup>53</sup> Harold Demsetz, "Why Regulate Utilities?," *Journal of Law and Economics* 11, no. 1 (1968).

<sup>54</sup> Christopher Hood, "The 'New Public Management' in the 1980s: Variations on a Theme," *Accounting, organisations and society* 20, no. 2/3 (1995).



Delegating a service may also respond to a non-economic rationale. Certain communities may opt for private delivery because it reflects their view on the role of government. From this perspective, supporters of contracting out may prefer to reduce the responsibilities of the government for ideological reasons, and not necessarily for economic gains. A government with fewer functions may be considered best for society, regardless the economic impact of transferring traditional state functions to private entities<sup>55</sup>. In addition, delegating a service may be politically attractive to a relevant authority as it allows the development of a “blame shifting” strategy if any problem with service provision arises.<sup>56</sup> By contracting out a service, the service provider, and not the relevant authority, might be made responsible for any deficiency in the provision of a water service.

Although the water operator does not own the water assets, a delegation period (which, in case of the concession is usually 20 to 30 years) gives water operators significant time to exercise exclusive powers over those water assets. Providers operating in a monopolistic environment and facing no threat of competition may have incentives to increase their profits at the expense of consumers, by increasing water tariffs or reducing water service quality. In the absence of these enforcement mechanisms, delegation to private parties may tend to benefit the water operators’ shareholders over the public interest.<sup>57</sup>

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<sup>55</sup> Germa Bel and Mildred Warner, "Does Privatization of Solid Waste and Water Services Reduce Costs? A Review of Empirical Studies," *Resources, conservation and recycling* 52 (2008).

<sup>56</sup> Hood, "The 'New Public Management' in the 1980s: Variations on a Theme."

<sup>57</sup> For a discussion on the mixed evidence over costs and efficiency of delegation to third party water operators, see Bel and Warner, "Does Privatization of Solid Waste and Water Services Reduce Costs? A Review of Empirical Studies."

To deter water operators from abusing their monopolistic powers, various regulatory mechanisms have been envisaged. Certain countries such as Scotland and England have opted for an economic regulation of the water utilities, in order to monitor their operations and to discipline them if they fail to provide appropriate service at the agreed prices. In other cases, the contract of delegation has been the main regulatory mechanism. The contract of delegation may establish performance targets, price limits and other service requirements that the water utility needs to fulfil. The relevant authority is directly in charge of ensuring that the contract is honoured throughout the delegation period – and to monitor and issue penalties if it is not. In this sense, to make delegation work, it is necessary to have efficient contract enforcement mechanisms, so to ensure that the water operator carries out its mandate within the limits established by the responsible authority.

#### **4. KEY PRINCIPLES TO EVALUATE GOVERNANCE FOR WATER SERVICES**

The previous discussion has shown that water services provision may involve a different set of actors with dissimilar responsibilities. Depending on who owns the water assets and how the service is managed, a variety of institutional contexts for water services provision can exist. Public authorities, private or public water operators and economic regulators may all be involved in various manners in the provision of water services. Countries have given different responses to the demands for the provision of drinking water in their jurisdictions, so different regulatory arrangements exist for the provision of water service regulation around the world.

The present study aims to develop a means to evaluate the different regimes for water service provision. Given that the current global water crisis is widely considered a crisis of governance and not of scarcity, this research aims to study different alternatives that a set of countries have developed to provide drinking water and sanitation to their populations. To do so, it develops a set of indicators to assess and compare cross-national variation in water services governance. Indicators provide information on the institutional and procedural mechanisms that a country has in place, and allow assessment of whether a country's governing activities meet certain desirable principles, such as participation, and access to information and to justice.<sup>58</sup> Governance indicators grade governance quality depending on the quality of the management of public service and affairs.

International organisations, such as the World Bank, the International Monetary Fund and the OECD, have developed indicators to assess and measure specific features of different national regulatory regimes. Hence, there is a plethora of governance indicators.<sup>59</sup> This research follows the principles defined at the UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental

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<sup>58</sup> Independent Commission for Good Governance in Public Services, "The Good Governance Standard for Public Services," (London: Office for Public Management Ltd, the Chartered Institute of Public Finance and Accountancy, 2004).

<sup>59</sup> For a compilation of institutions that employ governance indicators, see Christiane Arndt and Charles Oman, "Uses and Abuses of Governance Indicators," (Paris: Organisation for Economic Co-operation and Development, 2006). See also Asian Development Bank, "Policy Paper: Governance - Sound Development Management" (1995), <http://www.adb.org/Documents/Policies/Governance/govpolicy.pdf>. UNDP, "Governance for Sustainable Human Development," <http://www.undp-pogar.org/publications/governance/aa/goodgov.pdf>, Alistair Rieu-Clarke and Andrew Allan, "Role of Water Law: Assessing Governance in the Context of IWRM - an Analysis of Commitment and Implementation within the Tagus and Sesan River Basins," *STRIVER report n D6.3* (2008), [http://kvina.niva.no/striver/Portals/0/documents/STRIVER\\_D6\\_3.pdf](http://kvina.niva.no/striver/Portals/0/documents/STRIVER_D6_3.pdf).

Matters – the Aarhus Convention, to analyse the particularities of water services provision governance in Europe. This Convention has made an important contribution to the conceptual clarification of ‘governance’ and has identified a set of standards of governance that signatories need to guarantee.<sup>60</sup> It is considered a useful starting point to analyse water services governance.

Signed in 1998, the Aarhus Convention requires the signatories to ensure that citizens have rights to access to information, participate in decision-making and access to justice in environmental matters. The Convention rests on the principles agreed at the United Nations Conference on Environment and Development, which took place at Rio de Janeiro in 1992, and concluded with the signing the Rio Declaration on Environment and Development,<sup>61</sup> which intended to guide future sustainable development around the world. Article 10 of the Declaration, which the Aarhus Convention develops further, calls on governments to ensure the adoption of procedures to facilitate public participation, transparency for information concerning the environment and an effective access to judicial and administrative proceedings, including instruments to redress and remedy policies.

In developing these principles, the Aarhus Convention calls on public authorities to actively disseminate environmental information, facilitate access to environmental information by ensuring that all requests for information are

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<sup>60</sup> The Aarhus Convention, as it came to be called after the Danish city of Aarhus, was signed was adopted on 25th June 1998 at the Fourth Ministerial Conference in the 'Environment for Europe' process.

<sup>61</sup>United Nations, "Report of the United Nations Conference on Environment and Development,"(1992),  
<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>

answered within one month, and that applicants are not required to provide an explanation for their information request.<sup>62</sup> Concerning public participation, the Aarhus Convention requires public authorities to facilitate that the public and environmental non-governmental organisations can comment on proposals, plans and projects affecting or relating to the environment.<sup>63</sup> The Convention also protects the right to challenge public decisions that have been made without respecting the principles of access to information or public participation, or against environmental law in general.<sup>64</sup>

In this sense, transparency, accountability and participation have been considered critical principles of governance. This report focuses on assessing the extent national frameworks reflect these principles and give consumers the right to access information, to participate in decision-making processes and to access to justice. The report is therefore concerned about the rights granted to individual domestic users – not business or commercial actors. The sections below analyse the meaning and implications of these main principles.

#### **4.1. Transparency – Access to information**

Transparency has become one of the ubiquitous principles in the analysis of governance regimes. Transparency refers as a “government according to fixed and published rules, on the basis of information and procedures that are accessible to the public, and (in some usages) within clearly demarcated fields

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<sup>62</sup> Articles 4 and 5, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.

<sup>63</sup> Articles 6, 7 and 8, *Ibid*.

<sup>64</sup> Article 9, *Ibid*.

of activity.”<sup>65</sup> Transparency is thus closely linked to both ensuring and facilitating access to information; a transparent system of governance employs different instruments to make information available to the public. Measures such as regular publication of notes and documents on policy decisions and procedures and, more recently, the use of information and communication technologies have been considered tools to ensure transparency in policy-making.

Greater transparency is considered to have positive effects. Transparency is being seen as an essential component of democracy, as it contributes to ensuring that those affected by regulations can have access to relevant information about the regulatory measures that affect them.<sup>66</sup> Transparency is also considered a primary mechanism to incite the fight against corruption, organised crime and mismanagement.<sup>67</sup>

In addition, measures to improve transparency are considered beneficial for the economic regulation of the water industry. Water services are frequently provided by a water operator – which may be publicly or privately owned. The relationship between the relevant authority responsible and the water operator is characterised by the existence of information asymmetry: the water operator has relevant information that the competent authority lacks. In particular, if the preferences of these actors are not aligned, the provider may be inclined to

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<sup>65</sup> Christopher Hood, "What Happens When Transparency Meets Blame-Avoidance?," *Public Administration Review* 9, no. 2 (2007): 193.

<sup>66</sup> Howard Beales, Richard Craswell, and Steven Salop, "Information Remedies for Consumer Protection," *The American Economic Review* 71, no. 2 (1981).

<sup>67</sup> Transparency International, "Building Integrity to Ensure Effective Water Governance.", David Weil, "The Benefits and Costs of Transparency: A Model of Disclosure Based Regulation," (2002), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=316145](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=316145).

carry out actions deviant from the preferences of the relevant authority – with costlier or substandard practices as common results. For this reason, the establishment of measures to increase and improve the information that the principal gathers has become a condition to avoid information asymmetries, and the ensuing inefficiencies derived from moral hazard and adverse selection. Transparency, in this sense, may help to make the decision making process more efficient.

To analyse the levels of transparency in a regime, it is therefore necessary to ask whether consumers have access to information about the procedures and the results of the activities of relevant authorities and operators.

Hood has offered a useful classification of types of transparency according to two criteria: how transparency works (whether directly, so it is observable by people at large; or indirectly, only observable by experts or agents) and who is the subject of the information provided – individuals at large or organisations. The format of the information provided and its level of detail will vary depending on these variables, and characterise the type of transparency of a regime.<sup>68</sup>

Transparency mechanisms can also work at different stages of the policy making process.<sup>69</sup> Ex-ante mechanisms take place before a particular policy

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<sup>68</sup> Hood, "What Happens When Transparency Meets Blame-Avoidance?.", C Hood and D Heald, eds., *Transparency: The Key to Better Governance?*, Proceedings of the British Academy 135 (Oxford: Published for the British Academy by Oxford University Press, 2006).

<sup>69</sup> Martin Lodge and Lindsay Stirton, "Regulating in the Interest of the Citizen: Towards a Single Model of Regulatory Transparency," *Annual Workshop of the International Political Economy Group - University of Warwick* (2000).

decision is made. They aim at providing information to the public on projected measures, ensure the existence of clear rules and reduce uncertainties for future actions. Ex-post mechanisms take place after the decision has been taken, and their objective is to facilitate information to the public on the effects of an actual adopted measure. The distinction between ex ante and ex post transparency mechanism is relevant: the preferences and actions of both the regulated and regulators can be affected if information is available. Ex-ante mechanisms improve the levels of predictability in decision-making, whereas ex-post mechanisms guarantee the opportunities to review the behaviour and performance of regulators and regulated actors.

The analysis of the degree of transparency in the water service provision needs to take account of the different procedures and mechanisms to guarantee access to information to consumers.

#### **4.2. Participation**

Participation is a political principle that recognises the right of relevant parties (including regulated firms, consumers and other industry participants) to contribute to the regulatory process.<sup>70</sup>

In the tradition of civic republicanism, participatory democracy is stressed as a value in itself: participation is understood as precondition to democracy, with citizens exercising their powers either directly or indirectly as main subjects of a representative or deliberative democracy. In democratic regimes, calling for

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<sup>70</sup> J Stern and S Holder, "Regulatory Governance: Criteria for Assessing the Performance of Regulatory Systems: An Application to Infrastructure Industries in the Developing Countries of Asia," *Utilities Policy* 8, no. 1 (1999).



citizen participation in decision-making processes has a trans-ideological appeal. Citizen empowerment, educational benefits and political persuasion are considered important benefits that accompany public participation.<sup>71</sup> Participation is perceived as contributing to enhanced communication and negotiation between the citizens and their states, to deepen democracy, to create new spaces for citizenship, to boost effectiveness, and to introduce more equity on public policy.<sup>72</sup> Equally, participation in local decision-making processes and direct advocacy before state agencies are regarded as contributing to the enhancement of the definition and implementation of public policy.<sup>73</sup>

Consumers association and advocacy groups have frequently defended increasing opportunities for public participation and improving the channels of participation in most policy areas. For organisations such as the Access Initiative, for instance, "governments should actively reach out to stakeholders, and build the capacity of the public to take part in decisions."<sup>74</sup> Others have conceived participation as a possible measure for political

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<sup>71</sup>Renee A Irvin and John Stansbury, "Citizen Participation in Decision Making: Is It Worth the Effort?," *Public Administration Review* 64, no. 1 (2004).; From a development theory perspective, Lisa Thompson, "Participatory Governance? Citizens and the State in South Africa, African Centre for Citizenship and Democracy, ," (University of the Western Cape, 2007).

<sup>72</sup> A Cornwall and V Coelho, "Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas," [http://www.drc-citizenship.org/docs/publications/spaces\\_for\\_change/chapters\\_in\\_book/Cornwall%20intro.pdf](http://www.drc-citizenship.org/docs/publications/spaces_for_change/chapters_in_book/Cornwall%20intro.pdf).

<sup>73</sup> R Abers, *Inventing Local Democracy: Grassroots Politics in Brazil* (Boulder, CO: Westview Press, 2001), J Cohen and C Sabel, "Directly-Deliberative Polyarchy," *ELJ* 3, no. 4 (1997), N. Cunill, *Repensando Lo Público a Través De La Sociedad* (Caracas: Nueva Imagen, 1997), A Fung, "Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences," *J Philos* 11, no. 3 (2003).

<sup>74</sup> The Access Initiative, "Citizen Voices in Water Sector Governance: The Role of Transparency, Participation and Government Accountability."

inclusion of citizens, and particularly the poor, to water service provision and for development.<sup>75</sup> Participation needs to be made extensive to marginalised groups; acquiring the means to participate equally demands processes of popular education and mobilization that can enhance the skills of marginalized and excluded groups, enabling them to enter and engage in participatory arenas.<sup>76</sup> From this perspective participation is not just an invitation to take part of a process, but the empowerment of people to recognise themselves as citizens instead of 'beneficiaries or clients' and the establishment of institutions that address exclusionary practices and embedded bias.<sup>77</sup>

Apart from being highlighted as an element characterising a more developed democracy, public participation has also been considered to have a positive influence in the final economic output of a country.<sup>78</sup> From this perspective, increasing the co-operation between firms, consumers and others improves the quality of regulatory decisions and allows more efficient policies in both developing<sup>79</sup> and developed<sup>80</sup> countries. In particular, Palast, Oppenheim, and MacGregor argue that opening the regulatory system to participation has had

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<sup>75</sup> D Hall and E Lobina, "D60: Good Practice Recommendations," (Watertime, 2005). Cornwall and Coelho, "Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas."; UNDP, *Human Development Report* (New York: UNDP, 2003), World Bank, *World Development Report 2000/2001: Attacking Poverty* (New York: Oxford University Press, 2001).

<sup>76</sup> Cornwall and Coelho, "Spaces for Change? The Politics of Citizen Participation in New Democratic Arenas."

<sup>77</sup> Ibid.

<sup>78</sup> Stern and Holder, "Regulatory Governance: Criteria for Assessing the Performance of Regulatory Systems: An Application to Infrastructure Industries in the Developing Countries of Asia."

<sup>79</sup> North et al., "Governance, Growth, and Development Decision-Making."

<sup>80</sup> G Holburn and P Spiller, "Interest Group Representation in Administrative Institutions: The Impact of Consumer Advocates and Elected Commissioners on Regulatory Policy in the United States," University of California Energy Institute, <http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1006&context=ucei>.

positive impacts on the effectiveness, reliability and costs of service provision in electricity markets in the US. Participation ensures reduced information asymmetries, which has had a positive effect on lowering prices and costs.<sup>81</sup>

For critics, however, this is not always the case. They stress that the actual impact of participation in administrative and regulatory decision-making is rather ambivalent.<sup>82</sup> Observers have also pointed to the disadvantages of participation, which, in their view fails to deliver on the promise of citizens' empowerment and transformation.<sup>83</sup> Complacency, lack of authority, 'consultation fatigue' or the adoption of 'wrong' authoritative decisions unduly influenced by local economic interests have been pointed as negative outcomes of participatory procedures.<sup>84</sup> Similarly, the harmful effects of public participation, such as the high costs associated with long and costly participatory procedures have been also referred to.<sup>85</sup>

Whereas the impact of participation continues to be a contested issue, an alternative and fruitful venue for analysis has turned towards identifying the nature of citizen's participation. This has involved examining the types and mechanisms for public participation, which can help to unpack the meaning of

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<sup>81</sup> Greg Palast, Jerrold Oppenheim, and Theo MacGregor, *Democracy and Regulation: How the Public Can Govern Essential Services* (London: Pluto Press, 2003).

<sup>82</sup> Irvin and Stansbury, "Citizen Participation in Decision Making: Is It Worth the Effort?." J Innes and D Booher, "Reframing Public Participation: Strategies for the 21st Century," *Planning Theory & Practice* 5, no. 4 (2004).

<sup>83</sup> This has been particularly a topic referred to in the literature of contemporary development theory and practice. See Sam Hickey and Giles Mohan, "Relocating Participation within a Radical Politics of Development," *Development and Change* 36, no. 2 (2005).

<sup>84</sup> Irvin and Stansbury, "Citizen Participation in Decision Making: Is It Worth the Effort?." Andrea Cornwall, *Democratising Engagement. What the Uk Can Learn from International Experience* (London: Demos, 2008).

<sup>85</sup> Innes and Booher, "Reframing Public Participation: Strategies for the 21st Century."

participation in different regulatory regimes. From this perspective, it is necessary to analyse the characteristics of participation as a prior step to understanding its impact: who participates, in what areas, and how the process of participation works are critical questions to understand how participation takes place in a jurisdiction

Thus, thinking about the characteristics of participation has entailed distinguishing amongst different types of stakeholders invited to participate. Participation may take the shape of *grassroots participation* – funded by voluntary contributions – or of *proxy advocacy*, by which a group of experts represent the interests of the general public.<sup>86</sup> The knowledge, resources and preferences of such participants are likely to be significantly different, and so their input into the decision-making process.

Analysing types of participation has also invited researchers question the mechanisms of participation. A seminal contribution was made in 1969, when Arnstein reflected on the different types of participation in a article where she developed the idea of a “ladder” of citizen participation.<sup>87</sup> In her view, eight levels of participation can be identified, according to the extent of “citizens’ power in determining the end product.” The levels of participation could therefore run from non-participation (rubberstamp) to citizen control. From this perspective, it is necessary to observe what mechanisms facilitate consumer participation, and to what extent. The most common techniques for public participation are *public hearings, written public comments, the setting up of*

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<sup>86</sup> William T. Jr Gormley, "Policy, Politics, and Public Utility Regulation," *American Journal of Political Science* 27, no. 1 (1983).

<sup>87</sup> S. R. Arnstein, "A Ladder of Citizen Participation," *Journal of the American Institute of Planners* 35, no. 4 (1969).

*citizen-based commissions*.<sup>88</sup> An analysis of formal institutional design can provide a useful starting point for examination of participation in water regulation.<sup>89</sup>

As the following chapter shows, the present research is concerned with understanding the challenges and limitations of national institutional arrangements to voice the concerns of water users, and in particular of excluded or marginal water consumers. In this sense, it does not aspire at evaluating the impact of different degrees and opportunities for participation, but at offering a systematic comparison of different means for involvement of the public.

#### **4.3. Accountability – access to justice**

The principle of accountability applies when a decision “can be challenged in an effective way if, for example, certain decisions are thought to be unfair or incompetent.”<sup>90</sup> If challenged, an accountable person or organisation needs to give “reasonable justification for their decisions to some other person or body that has a reasonable right to require such justifications.”<sup>91</sup> When the behaviour

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<sup>88</sup> Innes and Booher, "Reframing Public Participation: Strategies for the 21st Century." Public hearings, initiatives, public surveys, negotiated rule making and citizens review panels are other institutional mechanisms widely employed to allow public participation in environmental risk decision, in Daniel Fiorino, "Citizen Participation and Environmental Risk: A Survey of Institutional Mechanisms," *Science, Technology and Human Values* 15 (1990).

<sup>89</sup>For a critical perspective, see Cornwall, *Democratising Engagement. What the Uk Can Learn from International Experience*.

<sup>90</sup>Stern and Holder, "Regulatory Governance: Criteria for Assessing the Performance of Regulatory Systems: An Application to Infrastructure Industries in the Developing Countries of Asia."

<sup>91</sup> Cosmo Graham, "Is There a Crisis in Regulatory Accountability?," in *A Reader on Regulation*, ed. Richard Baldwin, Colin Scott, and Christopher Hood (Oxford: Oxford University Press, 1998).

or performance of an actor is exposed as inappropriate, accountability means that measures are put into place to hold that actor responsible for their actions. The concepts of accountability and of access to justice are, in this sense, pillars a working political system based on the rule of law.

Problems of accountability and control are a frequently topic in the literature about power delegation.<sup>92</sup> If the powers to provide a service have been delegated to a third party, how can it be ensured that the responsible agency is held accountable if it fails to deliver that activity? Given that water services provision is frequently delegated to a third party, accountability and access to justice are important issues in assessing the quality of governance of a regime.

The tension between responsible agency and operator has been referred to as the “dilemma of accountable independence.”<sup>93</sup> Various procedures and instruments have been developed to monitor the behaviour of agencies, and discipline the cases of non-compliance.<sup>94</sup> In this report, “access to justice” refers to the ex-post enforcement mechanisms devised to improve accountability in a

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<sup>92</sup> Paul Magnatte, "The Politics of Regulation in the European Union," in *Regulation Through Agencies in the European Union*, ed. Damien Geradin, Rodolphe Munoz, and Nicolas Petit (Cheltenham: Edward Elgar, 2005), A Davies, *Accountability: A Public Law Analysis of Government by Contract*, ed. Keith Hawkins, Oxford Socio-Legal Studies (Oxford: Oxford University Press, 2001), Julia Black, "Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes," *Regulation & Governance* Forthcoming (2008), Peter Aucoin and Ralph Heintzman, "The Dialectics of Accountability for Performance in Public Management Reform," *International review of Administrative Sciences* 66 (2000).

<sup>93</sup> Magnatte, "The Politics of Regulation in the European Union," 3.

<sup>94</sup> Jonathan Caseley, "Multiple Accountability Relationships and Improved Service Delivery Performance in Hyderabad City," *International Review of Administrative Sciences* 72 (2006). Michelle Millar and David McKevitt, "Accountability and Performance Measurement: An Assessment of the Irish Health Care System," *International review of Administrative Sciences* 66 (2000). Aucoin and Heintzman, "The Dialectics of Accountability for Performance in Public Management Reform."

regime.<sup>95</sup> They include the legal remedies for aggrieved consumers to invoke before a specialised agency, court or judge, against authorities responsible for the delivery of water services and, when applicable, against operators acting on behalf of the authority.

To analyse accountability, it is important to clarify to whom the relevant actor is actually accountable.<sup>96</sup> Accountability can be exercised internally, so responsibilities are cleared within the organisation; or externally, i.e. responsibility towards the public or other actors such as government, parliaments, civil servants or other representatives, etc. Thus, an analysis of access to justice in water services provision has to take into account who might be subject to judicial review, the scope of activities that can be subject to judicial review, and the agency that will provide the review.

In addition, assessing governance entails the examination of the ease or difficulty to access to justice. Particular concerns have been raised concerning legal assistance for low-income communities and vulnerable consumers,<sup>97</sup> as well as the operation of the legal system in general. Overall, analysing access to justice allows an examination of the mechanisms to correct and deter

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<sup>95</sup> Cosmo Graham considers that problems of accountability between regulators and principals cannot be resolved with incremental changes (such as the imposition of rules and translating powers back to ministers). To provide a solution to the accountability problems, besides the development of procedural modifications, it is necessary to re-examine the relationship between government and regulators and reconsider the general duties given to regulators. In Graham, "Is There a Crisis in Regulatory Accountability?." A similar point is made in Magnatte, "The Politics of Regulation in the European Union," 17-20.

<sup>96</sup> Richard Baldwin, *Rules and Government* (Oxford: Oxford University Press, 1995), 44.

<sup>97</sup> Cornwall and Gaventa, "Bridging the Gap: Citizenship, Participation and Accountability.", S Kayaga and R Franceys, "Costs of Urban Utility Water Connections: Excessive Burden to the Poor," *Utilities Policy* 15, no. 4 (2007).

responsible authorities and operators from infringing their obligations to provide water services to consumers.

## 5. CONCLUSION

This chapter has discussed the meaning and implication of the concept of governance. It has argued that transparency, participation and access to justice are the central elements of governance. Their deficit has been recurrently put forward as a cause contributing to the current world water crisis. In addition, it has analysed the characteristics of water service provision as a natural monopoly and has discussed the development and the core elements of governance in water services provision. Access to information, participation and access to justice have been examined and their implications discussed. This chapter has argued that the concept of governance should be best analysed by breaking it into its constituent elements, which may help to evaluate the functioning of the different governance mechanisms in different regulatory settings. The following chapter proposes a methodology to do so.



## **CHAPTER 2.**

### **ASSESSMENT OF TRANSPARENCY, PARTICIPATION AND ACCESS TO JUSTICE IN WATER SERVICES PROVISION**

#### **1. INTRODUCTION**

This chapter argues the need to operationalise these governance principles in order to assess their presence within different regulatory regimes. It proposes a structured comparison of the national laws and regulations for water service provision in different countries in order to examine to what extent they actually favour transparency, participation and access to justice. By comparing the existing national regulations, the research aims to assess water governance in six different jurisdictions, as well as their similarities and differences.

Thus, the chapter focuses on the research's methodological approach. It does so in four sections. The first one analyses the characteristics of two areas of decision-making in water services provision focus of this research: (1) the setting of water prices, and (2) establishment of service quality standards. Subsequently, it introduces the main characteristics of the countries under study, according to two characteristics: the ownership and the management of their water services provision. Thirdly, it explains the criteria that the research uses to examine the degree of transparency, participation and accountability in each of the country cases. Finally, it examines the sources of information employed to compare the different regulatory frameworks in six European countries.

## 2. COMPARING PRICE AND QUALITY OF SERVICE STANDARD AND SETTING

This research analyses how and to what extent national regulatory frameworks ensure access to information, public participation and access to justice in the process of setting the *price* and *quality of service* standards of water services.

Water tariff setting refers to the national procedures established to determine the price that consumers pay for drinking water and sewerage services. Quality-standards setting refers to the procedures to establish the minimum applicable criteria for quality of drinking water, environmental protection and customer service. It thus comprises essential dimensions of service quality, such as the intrinsic quality of the water provided (e.g. chemical quality of water),<sup>98</sup> and water service standards, including standards applicable to the production process (e.g. environmental impact standards and health and safety standards)<sup>99</sup> and other aspects associated to the levels of customer service (e.g. the handling of complaints, billing and collection).<sup>100</sup> Water price setting and quality of service standards settings are two main areas of decision-making in water service provision, which directly affect the experience that water consumers have of the service they receive.

Close linkages exist between water price setting and service standards setting. The provision of a particular standard of service is an important driver for costs and therefore prices. Achieving a particular degree of water quality, treating urban waste water and providing certain customer standards commonly requires infrastructure and operating investment, which increase

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<sup>98</sup> M Arblaster, "Quality of Service Monitoring," <http://www.regulationbodyofknowledge.org/documents/172.pdf>.

<sup>99</sup> Klein, *Economic Regulation of Water Companies*, 8.

<sup>100</sup> Ibid.

the costs of providing a service and, generally the price that water users have to pay for it.

The relevant authorities have a crucial role in the setting of service quality standards. Matters of continuity of service, pressure, quality of water supplied, rate/frequency of complaints, customer service, etc. commonly depend on a decision by the relevant authorities, which need to decide on minimum standards associated to health and safety, environmental protection and customers preferences.<sup>101</sup> Even when the service is relinquished to a private provider, water tariffs and service quality standards depend not only on the decision of the water provider. Indeed, relevant public authorities, such as national or regional governments and other public bodies exert influence over prices and service standards by developing particular environmental, public health and water resource management policies.

Water price and service standards can be set in the following three main ways: self-setting, contractual and by command and control regulation. Self-setting occurs when the water provider decides on the procedure and the methodology to calculate water prices and set water quality standards: the water provider decides what information will be needed, what methodology will be used, and how it will proceed (e.g. consulting the community, consulting a ministry, open for comments of the municipality, etc).

Secondly, a *contract* may establish the information, the methodology and the procedure to follow to set water prices and water quality standards. A contract

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<sup>101</sup> Baldwin and Cave, *Understanding Regulation: Theory, Strategy, and Practice*.

is a legally binding agreement entered into by two or more parties. In water services, the contracting parties usually are the relevant authority, which has the power to contract-out the provision, and the water service provider. The contract may set the procedures to calculate water prices and set the standards, with reference to a particular methodology to follow (such as, for instance, how to calculate the cost of capital). As a safeguard against future contingencies, and given that the relevant authority does not have complete knowledge of conditions that may apply during the contract period, contracts are usually renegotiated.<sup>102</sup> The contract therefore frequently includes a date for recalculation of the prices set and for revision of the water quality standards agreed.

Finally, by command- and- control regulation, the relevant authority intervenes establishing the information requirements, the methodology and the procedures for price setting.<sup>103</sup> Implementing rules, in the form of statutory instruments, statutory orders, by-laws, and rules, usually define how to set water prices. There are cases, however, where the implementing rules do not provide detail on these matters, thus leaving great space for discretion to the water provider. This situation may be prone to judicialisation, as courts may have to mediate to clarify the content of the legislation throughout its application.

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<sup>102</sup> For a complete account see JL Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing It Right*, Wbi Development Studies (Washington: The World Bank, 2004). M Hantke Domas, "Common Legal Principles of Advanced Regulatory Systems," in *Agua Y Libre Comercio - Impacto E Implicaciones De Los Acuerdos De Libre Comercio Sobre El Agua Y Sus Servicios* (La Paz: Editorial Agua Sustentable, 2007)..

<sup>103</sup> Includes legislation (i.e. laws) and implementing rules (i.e. statutory instruments, statutory orders, by-laws, and rules).

It is important to stress that these mechanisms for water pricing are not mutually exclusive. In other words, a regulatory system can employ different mechanisms simultaneously, with different intensities. For instance, the general characteristics of the price setting process can be established by contract or by command and control mechanisms, whereas its particularities can be set unilaterally by the water provider.

### **3. COUNTRY CASES ANALYSED**

The research analyses the price and customer service standards setting in six European countries: England, France, Italy, the Netherlands, Scotland and Spain. These countries present differences in the type of water service they provide, according to the variables ownership and management. As seen in chapter 1, ownership refers to the possession of rights over water resources, infrastructure and the water assets. Ownership can be public or private: under public ownership, public authorities own all water assets and infrastructures. Under private ownership, private companies or individuals hold all rights over water assets and infrastructures.

For its part, management refers to the daily activities for the provision of water services – abstraction, transportation, quality control, distribution, collection of water. Water services can be directly managed by the authorities responsible for giving the service, or delegated by the responsible authorities to a third party (private or public water company). In this sense, national water services can be either direct or indirect.

With these two categories, water service provision can be divided into four main types: direct public management, delegated public management, delegated private management and direct private management:<sup>104</sup>

In Direct Public Management, the responsible body assumes full responsibility for service provision and chooses to execute the management tasks itself. The ownership and service provision are concentrated in one public body, which, in most cases, is a municipality or group of municipalities. In the cases analysed in this report, some French, Spanish and Italian municipalities provide the drinking water services directly.

In Delegated Public Management, the responsible entity appoints a management entity to execute the management of water supply services on its behalf. The operator in charge of providing the service remains in the public sector. Such are the cases of water services in the Netherlands and Scotland.

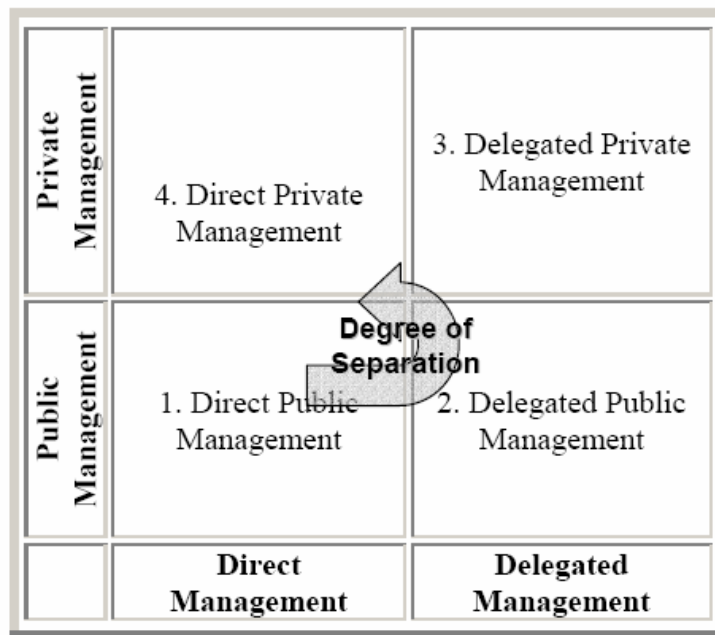
In Delegated Private Management, the responsible body appoints a private company to perform the day-to-day activities necessary for the provision of the service. The private operator operates with a contract in the shape of a lease or a concession contract. The responsible body is in charge of controlling that the private operator carries out its duties as set in the contract and regulates the appropriate provision of the service. In the cases analysed in this report, some municipalities in France, Spain and Italy carry out the provision of drinking water and sewerage by contracting out the services of private operators.

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<sup>104</sup> M van Dijk and M Schouten, "The Dynamics of the European Water Supply and Sanitation Market" (paper presented at the AWRA International Specialty Conference, 2004).

Finally, in Direct Private Management, the ownership and all tasks for water service provision are in the hands of private companies. The public authorities are in charge of controlling and regulating the activities of private parties, which own all water assets, and have the task and responsibility of delivering water services. In this research, England fits into the category of Direct Private Management.

Figure 1. Institutional arrangements (from van Dijk and Schouten (2004))



#### 4. CRITERIA FOR ASSESSMENT

This research develops a list of 14 criteria to compare across country cases. These criteria – or *tertia comparationis* – have been identified as the most relevant aspects (or “what matters”) in the analysis of governance in water services provision, from an analysis of the literature on water services

governance and from the examination of the particular country cases.<sup>105</sup> These criteria allow assessment of the degree to which the national regulatory framework provides for consumers to be completely informed, to take part in the decision-making of price and quality of service, and to have the right to an expeditious redress procedure before the judiciary in England, France, Italy, the Netherlands, Scotland and Spain.

#### 4.1. Transparency

The research employs five different criteria to assess the degree of transparency in the regulatory frameworks of the country cases analysed.

The first refers to the information on the inputs for the decision. It asks whether water consumers can have access to information on the inputs for the setting of water prices and service standards. For instance, information regarding investment, operation, pricing, and service quality. Are documents on the criteria employed to set water prices and water quality standards in the public domain, so consumers can have access to them? The objective here is to analyse whether water consumers can have access to the same documents that responsible bodies and authorities employ to reach a decision.

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<sup>105</sup> UNDP, "Governance Indicators: A Users' Guide," [http://www.undp.org/oslocentre/docs07/undp\\_users\\_guide\\_online\\_version.pdf](http://www.undp.org/oslocentre/docs07/undp_users_guide_online_version.pdf), M Besacon, "Good Governance Rankings: The Art of Measurement," World Peace Foundation, <http://belfercenter.ksg.harvard.edu/files/wpf36governance.pdf>, United Nations Development Programme and European Commission, "Governance Indicators: A Users' Guide," <http://www.undp.org/governance/docs/policy-guide-IndicatorsUserGuide.pdf>, Arndt and Oman, "Uses and Abuses of Governance Indicators." See Nils Jansen, "Comparative Law and Comparative Knowledge," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006), Ralf Michaels, "The Functional Method of Comparative Law," in *The Oxford Handbook of Comparative Law*, ed. Mathias Reimann and Reinhard Zimmermann (Oxford: Oxford University Press, 2006).



The second criterion relates to the transparency in the decision making process. It assesses whether the tariff setting process and the quality service procedure are clearly regulated so that the consumers can know how these processes work. Do consumers receive information on the criteria and conditions taken into account to reach a decision on water price and water quality?

The third criterion refers to the degree of transparency of the final decision: to what degree can consumers have access to the decisions that responsible bodies and authorities make on water price and quality of service: are decisions published so consumers know what has been agreed?

The forth criterion concerns the reasoning behind a particular decision. Are reasons for a particular water price or quality of standards given and published? The objective here is to assess to what degree consumers have access to information supporting a particular decision, and to the objectives the responsible body and the relevant authority pursue with their decisions.

The fifth criterion refers to the existence of formal mechanisms to protect the right to access information, such as the existence Freedom of Information legislation and specialised bodies for settlements of disputes on disclosure of public information.

**Table 1. Criteria on access to information**

1.	Regulatory documents are in the public domain so that consumer can have access to them
2.	Tariff setting process and the quality service procedure is regulated so that the consumers know how it works
3.	Decisions published so that consumer can access to them

4. Reasoning behind decisions published so that consumer can access to them
5. Formal mechanisms for protecting the right to access information

#### 4.2. Participation

Public participation refers to the intervention of water consumers in the decision-making processes to set water prices and service standards. Various sub-criteria are employed here to assess the degree of participation.

The first criterion refers to the protection of consumers' participation in the decision making process. It asks whether consumers have a recognised right to participate in the regulatory process: is public participation ensured in the regulatory framework?

The second criterion refers to the areas of decision-making where consumers are allowed to participate. It asks whether consumers are entitled to participate in the spheres of water price setting, and service quality standards setting. Are there procedures established so consumers can intervene in these areas/debates?

The third criterion concerns the degree of participation of consumers in the decision-making process to set water tariff and quality standards. In particular, it enquires whether the regulatory framework provides for co-decision, consultation or input of preferences of water consumers in the process of setting water prices and service standards.

Finally, the fourth criterion relates to the obligation to provide a response to consumers regarding the extent to which their opinion has been taken into

account in the final decision. This mechanism ensures that consumers' input is weighed and acted upon.

**Table 2. Criteria on public participation**

6.	The regulatory framework guarantees the right of consumers to participate in price and customer standards setting
7.	The regulatory framework allows for participation of consumers in the spheres of investment, operation, pricing, and service quality
8.	Consumers can participate in stakeholders multilateral meetings: for co-decision, consultation or opinion for water price and water standards setting
9.	Consumers have the right to receive feedback so that they can understand to what extent their views are taken into account

### 4.3. Access to justice

Five different criteria are employed to assess and compare the degree of access to justice in the different countries analysed:

The first criterion concerns the existence of mechanisms so consumers can initiate non-judicial proceedings against the organisations providing the service (water operators or local authorities directly). The objective is to analyse whether aggrieved consumers can challenge the decisions in administrative bodies such as regulatory agencies, commissions or complaints boards.

The second aspect analyses whether consumers can initiate non-judicial proceedings against relevant authorities with responsibilities for the setting of tariffs and customers services standards. Can regulatory agencies, ombudsmen, etc intervene to re-examine decisions taken by public authorities regarding water prices and quality standards?

Thirdly, the research assesses whether water service providers can be penalised in courts if it is identified that they have failed to fulfil their service duties. Can water users initiate proceedings that might result in a judicial sanction against the water operators (when the service is delegated) or by local or supramunicipal authorities when they provide the service directly?

The fourth element assesses the existence of judicial mechanism to make relevant authorities accountable of their decisions and performance. Can water users initiate proceedings that might result in public authorities being sanctioned for failures to ensure adequate prices and customer standards?

The final criterion refers to the financial costs associated with the initiation of an administrative or judicial procedure. It enquires about the costs associated to do so, and the existence of legal aid for petitioners. This factor focuses on whether the costs associated to initiating a review of the decisions taken by the relevant authorities may be a obstacle to consumers to exercise their right to access to justice.

**Table 3. Criteria on access to justice**

10. Consumers can initiate non-judicial proceedings against water services providers (either the responsible body directly or a contracted water operator) if they fail to perform their duties
11. Consumers can initiate non-judicial proceedings against relevant authorities if they fail to perform their duties
12. Consumers can initiate judicial proceedings against water services providers (either the responsible body directly or a contracted water operator) if they fail to perform their duties
13. Consumers can initiate judicial proceedings against relevant authorities if they fail to perform their duties
14. Consumers have to assume financial costs of bringing cases to court a) Court fees apply b) Legal aid is available

## 5. SOURCES OF INFORMATION

To analyse the degree of transparency, participation and access to justice in the setting of water price and customer standards, the research has examined mainly legal texts. In particular, primary national and sub-national legislation: Constitutions, Water Acts, Environmental Acts, regional laws, judicial procedure legislation, freedom of information legislation, administrative and criminal justice law, etc. Also, secondary legislation or implementing rules, such as statutory instruments, statutory orders and decrees, have also been used. In addition, use has been made of some secondary sources such as national and international official reports, documents and websites by governments, water operators and economic regulators. Academic articles and books on the decision making process for water price setting and customer standards setting has also been used to illustrate some of the points raised.

The research also draws from information collected from a number of interviews and meetings with national water experts and stakeholders. National, regional and local government officials, academics with expertise in law, representatives of private water companies, members of consumers associations and policy consultants have contributed to the analysis in all country cases.<sup>106</sup>

## 6. CONCLUSIONS

Governance in water service provision needs to be analysed by carrying out a structured comparison of the national laws and regulations for water service

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<sup>106</sup> To guarantee confidentiality, the list of names of interviewees are not included in this report, but can be provided by request to the author.

provision, in order to assess the different national regulatory regimes. To do so, the chapter has proposed to analyse, in particular, the procedures followed to set water prices and to establish service quality standards in six European countries. It has also examined the criteria that the research uses to examine the degree of transparency, participation and accountability in each of the country cases. With these criteria, the following chapters proceed to analyse to what extent and how water customers in England, France, Italy, the Netherlands, Scotland and Spain are informed, take part in the decision-making process and have the right to an expeditious redress procedure before the judiciary.

## **CHAPTER 3. EUROPEAN UNION**

### **1. INTRODUCTION**

The analysis of governance in water services provision in the six country cases needs to begin by considering the duties created by EU legislative acts. EU legislation has developed substantive and procedural requirements that all EU Member States need to meet when providing water services. Thus, independently of the national proceedings and legal instruments they follow to serve the needs of their nationals, all EU Member States are bound to ensure compliance with these supranational standards.

Substantive standards refer to the requirements on the content of the policies that EU Member States need to develop to comply with EU law. Four EU directives are given particular attention in this chapter: Bathing Water Directive, Drinking Water Directive, the Urban Waste Water Treatment Directive and the Water Framework Directive. These legal texts have made considerable demands on capital expenditure for water services provision in all EU Member States, which have had direct impact both on the costs and on the standards of water services across the EU.

For their part, procedural standards are demands on process that EU Member States need to comply with when developing their national policies. These requirements have been linked – albeit not exclusively - to the adoption by the EU institutions of the Convention to information, public participation in decision-making and access to justice in environmental matters (the Aarhus

Convention), and the following EU directives on the subject. They have had a significant impact on how Member States conduct their national environmental and water policies regarding the involvement of the public in national decision-making, and therefore, on the characteristics of their national governance regimes for water services provision.

## **2. SUBSTANTIVE STANDARDS SET IN EU LEGISLATION**

EU legislation is a source of substantive standards for water resources management and water services provision in all EU Member States. EU Member States have transferred some responsibilities for standard setting to the EU institutions, leading to the progressive internationalisation of concerns that previously had strictly a national dimension. Both the EU treaties and secondary EU legislation –especially EU directives - contain requirements for a common EU water policy, including environmental and water quality standards that all EU Member States need to adopt.

### **2.1. Treaty provisions for EU water legislation**

The European treaties create the legal foundation for the action of EU institutions, which have progressively expanded their responsibilities in water policy on the basis given by the EU treaties.

Although the Treaty of Rome did not give the European institutions a mandate for environmental and public health regulations, the period from 1975 to 1986 witnessed the development of the first major proposals for water pollution



control and drinking water standards.<sup>107</sup> The EU institutions understood that the existence of different national policies for pollution control hampered the creation of a common market by distorting the costs that producers had to face in different countries to comply with different environmental and public health standards. For this reason, and in agreement with the Treaty of Rome, the water directives adopted in this period aimed at creating a level playing field for a common market by establishing common environmental laws.<sup>108</sup> Regulation during this period sought to harmonise national pollution policies by ensuring that any cost associated with pollution control and public health was assumed entirely by the polluting Member States, and not by any other EU country.

In 1986, with the adoption of the Single European Act, the European Community introduced the objective “to preserve, protect and improve the quality of the environment, to contribute towards protecting human health, and to ensure a prudent and rational utilization of natural resources”.<sup>109</sup> Thus, the protection of the environment became an objective in itself for the action of EU institutions, and not merely a means towards achieving a common market. In 1992, the Treaty of the EU (or Maastricht Treaty) built on these provisions and gave the European institutions new powers for the establishment of a common environmental policy. “Environmental protection” became a principle for the action of the EU institutions, which would guide the development of policy initiatives for a more integrated environmental

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<sup>107</sup> The Treaty of Rome, or Treaty establishing the European Economic Community, was modified and renamed by the 1992 Treaty of Maastricht as Treaty of Economic Community (TEC Treaty). See Title II of *Treaty of European Union*.

<sup>108</sup> See section 2.2 below.

<sup>109</sup> Article 130r, *Single European Act*.

policy.<sup>110</sup>The Amsterdam Treaty, in 1997, highlighted again that the policies and activities of the EU institutions must aim at protecting the environment.<sup>111</sup>

The Lisbon Treaty, in force since 1 December 2009, has amended the treaties of Rome and of the European Union, without replacing them.<sup>112</sup> Regarding environmental policy, the treaty sets out codecision as the main EU legislative procedure to carry out environmental legislation.<sup>113</sup>This procedure was introduced in the Maastricht Treaty, and expanded to cover new policy areas by the treaties of Amsterdam (1999) and Nice (2003). Regarding environmental policy, some exceptions exist. The Lisbon Treaty defines certain areas when codecision does not apply. Amongst the exceptions are all decisions affecting the “quantitative management of water resources or affecting, directly or indirectly, the availability of those resources”.<sup>114</sup> In these cases, the Council acts under unanimity rule after consulting the European Parliament, the Economic and Social Committee and the Committee of the Regions. Hence, EU policy-making concerning this issue requires the highest degree of agreement amongst EU Member States.

Overall, the EU treaties have given legal basis to the development of secondary EU legislation regulating the water sector at an EU level. As seen below, this legislation has concerned, above all, the establishment of standards for social and environmental regulation, rather than the economic regulation of the

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<sup>110</sup> Preamble of the *Treaty on European Union*.

<sup>111</sup> Article 174 TEC consolidated version (ex Article 130r TEC)

<sup>112</sup> The Treaty of Rome has been renamed the Treaty on the Functioning of the European Union

<sup>113</sup> As already established by Article 175 TEC. The procedure for co-decision is outlined in article 294 of the Treaty on the Functioning of the European Union (ex Article 251 TEC)

<sup>114</sup> Article 192, ex article 175TEC.

sector. Indeed, the liberalisation of services in the internal market has excluded water supply and sewerage services as subject to EU laws for competition and liberalisation<sup>115</sup>. In this sense, the economic regulation of water services provision has remained essentially national in character.

## 2.2. The EU Water Directives

Table 1 lists the directives for water environmental and quality protection adopted by the EU institutions. They regard the protection of coastal, freshwater and groundwater, and have the objective of providing protection to the aquatic environment and of ensuring high standards of public health for drinking water.

**Table 4 – Principal EU Directives on water legislation**

1975 Surface Water Directive
1976 Dangerous Substances Directive discharged to the aquatic environment. Codified in 2006
1976 Seven Dangerous Substances Daughter Directives
1976 Bathing Waters Directive.
1978 Fish Waters Directive (amended in 1991, 2003. Codified in 2006)
1979 Shellfish Waters Directive (amended in 1991. Codified in 2006))
1980 Drinking Water Directive (revised in 1998)
1980 Groundwater Directive
1991 Urban Waste Water Treatment Directive (revised in 1998)
1991 Nitrates Directive
1996 Integrated Pollution Prevention and Control (IPPC) Directive (modified in 2008)
2000 Water Framework Directive
2006 Protection of Groundwater Directive
2006 Management of Bathing Water Quality Directive
2008 Priority Substances Directive

Out of these main directives adopted by EU institutions, four stand out for having created substantive standards with major impact on water services provision:

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<sup>115</sup> See Article 16, *Directive 2006/123/EC of the European Parliament and of the Council on Services in the Internal Markets*.

The first Bathing Water Directive<sup>116</sup> set limits on physical, chemical and microbiological pollutants that Member States needed to enforce.<sup>117</sup> These limits aim essentially to prevent and reduce the presence of sewage sludge in waters intended for bathing. In addition, the directive has established that national authorities need to organise regular sampling of freshwater and coastal bathing waters, and must ensure that these limits are not exceeded. A main consequence of the bathing directive has been the introduction waste water treatment for a large number of urban discharges to bathing waters. Only by giving treatment to polluted waters could EU Member States ensure compliance with the directive's pollution limits, so large infrastructure developments have been put in place across the EU to comply with the directive. The directive will be replaced in 2014 by a new directive on bathing waters, which imposes fewer but more stringent standards and aims to modernise the management of bathing waters, including the provision of more detailed information on bathing water quality to the public.<sup>118</sup>

The second EU directive with large impact on the quality of service that European consumers receive is the Drinking Water Directive.<sup>119</sup> This Directive seeks to establish quality standards for drinking water quality at the tap. To do so, the directive follows the World Health Organisation (WHO) guidelines to set detailed maximum limits on microbiological and chemical parameters that

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<sup>116</sup> Council Directive 76/160/Eec of 8 December 1975 Concerning the Quality of Bathing Water

<sup>117</sup> Annex 1, Ibid.

<sup>118</sup> Directive 2006/7/EC of the European Parliament and of the Council of 15 February 2006 Concerning the Management of Bathing Water Quality and Repealing Directive 76/160/Eec

<sup>119</sup> Council Directive 80/778/Eec of 15 July 1980 Relating to the Quality of Water Intended for Human Consumption, revised by Council Directive 98/83/EC of 3 November 1998 on the Quality of Water Intended for Human Consumption.

the supplied water should not exceed;<sup>120</sup> The directive establishes forty-eight microbiological and chemical parameters that need to be monitored and tested regularly to ensure water's "wholesomeness". The directive authorises Member States to include additional requirements for drinking water provision, but they are not allowed to set lower standards of protection.<sup>121</sup> It also includes conditions concerning the regular monitoring of drinking water quality standards, with which Member States are obliged to comply.<sup>122</sup> The Directive has had a large impact on water services provision, as Member States needed to ensure that the appropriate treatment was given to waters destined for human consumption, and, therefore, that the appropriate technology was put in place for this purpose. Again, as in the case of the Bathing directive, the drinking water directive has required member states to introduce large infrastructure investment in order to meet the required EU standards for water quality.

Thirdly, the Urban Waste Water Treatment Directive has imposed conditions for the provision of water services in Europe.<sup>123</sup> Aimed at controlling pollution discharges to the aquatic environment, the directive instructs that all significant sewage discharges need to be treated before they are disposed into rivers or coastal areas. Thus, all agglomerations of over 2000-population

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<sup>120</sup> Article 4 and Annex, *Council Directive 98/83/EC of 3 November 1998 on the Quality of Water Intended for Human Consumption*.

<sup>121</sup> Article 5.3, *Ibid*.

<sup>122</sup> Article 7, *Ibid*.

<sup>123</sup> *Council Directive 91/271/EEC of 21 May 1991 Concerning Urban Waste-Water Treatment*. It was amended in 1998 by *Commission Directive 98/15/EC of 27 February 1998 Amending Council Directive 91/271/EEC with Respect to Certain Requirements Established in Annex I Thereof*

equivalent<sup>124</sup> need to treat waste waters they dispose into coastal or fresh waters, so urban discharges meet certain pollution limits – specified in Annex 1. The directive defines a set of deadlines that EU Member States need to meet, giving priority to the treatment of more polluting discharges happening in more sensitive waters.<sup>125</sup> In addition, the directive defines conditions for a regular monitoring of the performance of the treatment plans and the status of all bodies of waters. Although the final deadline for meeting the main requirements of the directive, *i.e.* 31 December 2005, has now passed, EU Member States currently continue to implement its requirements. In particular, the new Member States that joined the EU in 2004 and 2007 are currently putting in place the infrastructure required to comply with the UWWTD. Like the Bathing Waters Directive, the adoption of the UWWTD by Member States has created large capital expenditure requirements to ensure the treatment demanded in the directive.

Finally, the Water Framework Directive(WFD) has also had large impact on the provision of water services in the EU Member States.<sup>126</sup> The WFD introduces guiding principles for environmental water policy, including the notions of “sustainable development” and “integrated management”.<sup>127</sup> The directive created substantive requirements for the management of water resources in Europe, which are called to have a significant impact on the

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<sup>124</sup> According to article 2.6 of the Directive: “1 p.e. (population equivalent)’ means the organic biodegradable load having a five-day biochemical oxygen demand (BOD5) of 60 g of oxygen per day.

<sup>125</sup> Article 4, *Council Directive 91/271/Eec of 21 May 1991 Concerning Urban Waste-Water Treatment*

<sup>126</sup> *Directive 2000/60/Ec of the European Parliament and of the Council Establishing a Framework for the Community Action in the Field of Water Policy*

<sup>127</sup> See preamble of the *Directive 2000/60/Ec of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy*.

service that consumers receive. It has also introduced important procedural requirements regarding the active involvement of water stakeholders in river basin management planning. This issue is discussed further in section 3.2 further below.

First, regarding water standards, the WFD makes requirements onto the Member States to ensure that all EU waters achieve “good ecological status” and “good chemical status” Good ecological status is a composite standard defined in the Directive in terms of the quality of the biological community, the hydrological characteristics and the chemical characteristics.<sup>128</sup> “Good chemical status” is defined in terms of compliance with all the quality standards established for chemical substances at European level.<sup>129</sup> All EU Member States need to develop River Management Plans, specifying how they plan to achieve “good status” in all their river basin districts and marine waters up to one nautical mile from shore.<sup>130</sup> This requirement entails an analysis of the status of the bodies of water<sup>131</sup>, a plan of measures to improve the conditions of waters<sup>132</sup>, and system for monitoring and reporting any progress.<sup>133</sup>

As for water pricing, the WFD determines that Member States should “take account of the principle of recovery of the costs of water services”, broadly defined to include the costs of abstraction and distribution of fresh water and

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<sup>128</sup> Article 4 and Annex V, Ibid.

<sup>129</sup> Article 16 and Annex IX, Ibid.

<sup>130</sup> Article 13, Ibid.

<sup>131</sup> Article 5.1, Ibid.

<sup>132</sup> Article 11, Ibid.

<sup>133</sup> Article 7, Ibid.

for the collection and treatment of waste water.<sup>134</sup> The WFD asks EU national governments to ensure that appropriate mechanisms for costing water resources management and water services provision are developed, and to specify how different water prices contribute to recover the costs of providing water services.<sup>135</sup>

Overall, the WFD has provided a unified approach to water legislation, by supporting a River Basin Approach to water management and by providing overall quality or good status objectives for all EU water sources. By introducing the principle of river basin management, the WFD allows to coordinate the planning, the development and the use of water resources in an integrated manner, taking account of the status of all European rivers.

Apart from these four directives, other legal texts have developed obligations for the management and the protection of water resources across the EU. By doing so, these directives have contributed to improve the quality of the raw water used for providing water services and therefore have had an impact on the costs of supply drinking water to EU consumers, albeit not as direct as the previous four directives. In certain cases, the WFD has integrated some of the content of these directives via transitional periods, or repealed some of their provisions by imposing new standards.<sup>136</sup>

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<sup>134</sup> Article 9.1, Ibid.

<sup>135</sup> Article 9.2. Ibid.

<sup>136</sup> Article 22, Ibid.



In particular, the Dangerous Substances Directive discharged to the aquatic environment<sup>137</sup> lists the classes of substances or preparations that are considered to be dangerous. It aimed at regulating the impact of industrial discharges into waters by limiting pollution emissions, and by requiring Member States to ensure that pollution limits are not exceeded.

The Freshwater Fish<sup>138</sup> and the Shellfish Waters<sup>139</sup> Directives have also aimed at protecting fresh water bodies identified as suitable for sustaining, respectively, fish and shellfish populations. To do so, the directives set water quality objectives according to physical, chemical and bacteriological parameters that Member States need to enforce. In 2013, the directives will be replaced by the WFD, which needs to set standards as least as stringent as the currently ones.<sup>140</sup>

Particular attention needs to be given to EU legislation regulating pollution to groundwater. Protecting groundwater has an important impact for the provision of water services, as groundwater is a main source of drinking water. In 1980, a directive was adopted to regulate the impact that indirect or direct discharges of certain chemical substances may have on the quality of

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<sup>137</sup> Directive 76/464/Eec of 4 May 1976 on Pollution Caused by Certain Dangerous Substances Discharged into the Aquatic Environment of the Community

<sup>138</sup> Council Directive 78/659/Eec of 18 July 1978 on the Quality of Fresh Waters Needing Protection or Improvement in Order to Support Fish Life. It has been codified by Directive 2006/44/Ec of the European Parliament and of the Council of 6 September 2006 on the Quality of Fresh Waters Needing Protection or Improvement in Order to Support Fish Life (Codified Version).

<sup>139</sup> Council Directive 79/923/Eec of 30 October 1979 on the Quality Required of Shellfish Waters. It has been codified, with its modification, by Directive 2006/113/Ec of the European Parliament and of the Council of 12 December 2006 on the Quality Required of Shellfish Waters (Codified Version).

<sup>140</sup> Article 22.2, Ibid

groundwater.<sup>141</sup> The directive prohibits the direct discharge of the most hazardous substances,<sup>142</sup> and requires Member States to develop comprehensive and effective control over both indirect and pollution point sources. The adoption of the WFD has meant that, from 2013, the Groundwater directive will be repealed, for the benefit of the broader objectives of the WFD, plus the more detailed measures of the new Groundwater Directive adopted in 2006.<sup>143</sup> This directive complements the provisions of the WFD by setting new underground water quality standards<sup>144</sup> and introducing measures to prevent or limit inputs of pollutants.<sup>145</sup> These quality standards take account local features and allows for further improvements to be made based on monitoring data and new scientific knowledge.<sup>146</sup>

Other EU texts address particular industries that pollute water resources. The objective of the Nitrates Directive<sup>147</sup> is to control water pollution deriving from agriculture and farming practices. It demands Member States to classify national water bodies according to their degree of nitrate pollution- used extensively in organic and chemical fertilisers,<sup>148</sup> and to develop national measures (Action Programmes) destined to protect the most polluted water areas.<sup>149</sup> For its part, the Integrated Pollution Prevention and Control Directive

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<sup>141</sup> Council Directive 80/68/Eec of 17 December 1979 on the Protection of Groundwater against Pollution Caused by Certain Dangerous Substance.

<sup>142</sup> Article 4, Ibid.

<sup>143</sup> Directive 2006/118/Ec of the European Parliament and of the Council of 12 December 2006 on the Protection of Groundwater against Pollution and Deterioration.

<sup>144</sup> See Annexes 1 and 2, Ibid.

<sup>145</sup> Article 6, Ibid.

<sup>146</sup> Article 8, Ibid.

<sup>147</sup> Council Directive 91/676/Eec of 12 December 1991 Concerning the Protection of Waters against Pollution Caused by Nitrates from Agricultural Sources.

<sup>148</sup> Article 3, Ibid.

<sup>149</sup> Article 5, Ibid.

regards the pollution caused by large industries' emissions. The text was adopted in 1996, and replaced in 2008 by a codified version.<sup>150</sup> The IPPC Directive asks EU Member States to put in place minimum requirements for tackling discharges into water by large industrial installations– as well as for air and soil and for tackling waste, wastage of water and energy, and environmental accidents.<sup>151</sup> It demands the implementation of “best available techniques” for pollution minimisation,<sup>152</sup> and makes the issuing of pollution licenses and permits dependant from implementing these measures.

More recently, a directive on priority substances has been adopted.<sup>153</sup> This text establishes annual average maximum limits and maximum allowable concentration of 33 different types of substances in waters, and 8 other pollutants, such as lead, mercury, pesticides, etc.<sup>154</sup> This directive replaces 5 previous directives dealing with pollution of certain substances, and supports the Water Framework Directive with a new list of priority substances which are considered to be of major concern. This directive helps to identify what is understood as good chemical status: a water body is considered to have “good

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<sup>150</sup> Council Directive 96/61/Ec of 24 September 1996 Concerning Integrated Pollution Prevention and Control The directive has been codified by Directive 2008/1/Ec of the European Parliament and of the Council of 15 January 2008 Concerning Integrated Pollution Prevention and Control (Codified Version).

<sup>151</sup> Article 1, Directive 2008/1/Ec of the European Parliament and of the Council of 15 January 2008 Concerning Integrated Pollution Prevention and Control (Codified Version).

<sup>152</sup> Article 3 and article 10, Ibid.

<sup>153</sup> Directive 2008/105/Ec of the European Parliament and of the Council of 16 December 2008 on Environmental Quality Standards in the Field of Water Policy, Amending and Subsequently Repealing Council Directives 82/176/Eec, 83/513/Eec, 84/156/Eec, 84/491/Eec, 86/280/Eec and Amending Directive 2000/60/Ec of the European Parliament and of the Council.

<sup>154</sup> Annex 1, Ibid.

chemical status” when it does not exceed the maximum pollution limits of substances and pollutants identified by the directive.<sup>155</sup>

In this sense, EU water legislation is the source of a considerable number of water environmental and public health standards that EU Member States are required to meet. National water services are affected by this legislation to different degrees: whereas some EU directives have created direct obligations on national water services providers (such is the case of the Bathing Waters Directives, the Drinking Water Directive, the UWWTD and the WFD), others have influenced the quality of raw waters, with knock-on effects on the costs incurred to supply water and sewerage services.

### **3. EU LEGISLATION SETTING PROCEDURAL STANDARDS**

Along with substantive standards, EU law has also introduced provisions concerning the manner in which Member States should conduct their national water policies. The EU institutions embarked on an analysis of the European system of governance and decision-making. A result of this examination was the White Paper on European Governance, published in 2001, which was based on a series of reports from working groups, studies and consultations on the rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence.<sup>156</sup> In the White Paper the Commission developed a series of points for the action of EU institutions and

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<sup>155</sup> Article 1, *Ibid.*

<sup>156</sup> Commission of the European Communities, "European Governance: A White Paper," (Brussels: Commission of the European Communities, 2001).

Member States, including proposals for more involvement of European citizens and more effective and transparent consultation in decision-making.<sup>157</sup>

This section analyses EU legal texts that have created obligations on the Member States on how they conduct their national policies for the provision of water services. It distinguishes two types of legal texts: those that have created general obligations for national environmental policy, which has an impact in the provision of water services - and those have generated water -specific provisions, particularly designed to establish procedural standards for the water sector.

### 3.1. Procedural standards for environmental policy

Although previous EU legislation exists,<sup>158</sup> the signing by the European Community of the Convention to information, public participation in decision-making and access to justice in environmental matters (the Aarhus Convention) introduced key procedural standards into the Community legal order. The Aarhus Convention was adopted on 25 June 1998 at a Ministerial Conference of the United Nations Economic Commission for Europe.<sup>159</sup> The Convention requires signatories to guarantee rights of access to information,

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<sup>157</sup> Ibid., 4, 11-18.

<sup>158</sup> Most significantly, *Council Directive 90/313/Eec of 7 June 1990 on the Freedom of Access to Information on the Environment*. Also, the first directive on Environmental Impact assessment, adopted in 1985 (amended subsequently in 1997, 2003, and 2009): *Council Directive 85/337/Eec of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment*.

<sup>159</sup> The UNECE region includes the countries of Europe, but also countries in North America (Canada and United States), Central Asia (Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan and Uzbekistan) and Western Asia (Israel). The UNECE has today 56 Member States. See United Nations Economic Commission for Europe, "Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters," <http://www.unece.org/env/pp/welcome.html>.

public participation in decision-making and access to justice in environmental matters. As water is considered an element of the environment, the Aarhus Convention creates obligations on the parties to guarantee these procedural standards.

Indeed, regarding access to information, the Convention establishes the obligation on public authorities to respond to public requests for information, and to provide environmental information, such as collection, updating, and public dissemination.<sup>160</sup> “Environmental information” is defined broadly, and includes a non-exhaustive list of elements of the environment (such as air, water, soil etc.), as well as factors, activities, measures, that may affect the status of air, water and soil. In addition, information should also be provided regarding conditions of life, cultural sites and built structures that are or may be affected by these elements, activities and measures. The Aarhus Convention allows public authorities to withhold information where disclosure would adversely affect various interests, such as, amongst others, national defence, international relations, public security, the course of justice, commercial confidentiality, intellectual property rights, personal privacy, etc. The convention establishes, nonetheless, that exemptions are to be interpreted in a restrictive way.

Regarding public participation, the Aarhus Convention indicates the need to make provisions for the public to participate in the preparation of plans and programmes relating to the environment".<sup>161</sup> Annex I lists the areas that require

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<sup>160</sup> Article 4, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*.

<sup>161</sup> Article 7, *Ibid*.

participation of the public. In addition, the Convention asks the establishment of reasonable timeframes for participation, opportunities for early participation, and the obligation to ensure that any input by the public is given "due account".<sup>162</sup>

On access to justice, the Convention seeks to provide access to justice in three contexts: review procedures with respect to information requests, with respect to decisions that are subject to public participation requirements, and to breaches of environmental law in general.<sup>163</sup> The procedures in each context required to be 'fair, equitable, timely and not prohibitively expensive'.<sup>164</sup> Signatories are expected to provide assistance to remove or reduce financial and other barriers to access to justice.

The EU has developed a "dualist approach"<sup>165</sup> to the enactment of the Aarhus Convention, by which, apart from introducing the obligations by means of a ratification of the Convention, the EU has also developed legislation to ensure that the Convention provisions are adopted at both the EU and national levels.<sup>166</sup>

First, the EU institutions enacted the Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC. This

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<sup>162</sup> Article 6, Ibid.

<sup>163</sup> Article 9, Ibid.

<sup>164</sup> Ibid.

<sup>165</sup> Georges-Stavros Kremlis, "The Aarhus Convention and Its Implementation in the European Community" (paper presented at the Seventh International Conference on Environmental Compliance and Enforcement, Marrakech, 2005), 142.

<sup>166</sup> Ibid.

text asks EU Member States to make provisions to ensure that any legal or natural person has access to environmental information held by public authorities, including information on the status of the environment, pollutants, policy measures, cost and benefits analyses, etc. The Directive also articulates a series of exceptions that may justify a refusal to provide for a request for environmental information. Non-availability of information, vagueness of the request, information confidentiality, etc. are reasons, amongst others, for a refusal to facilitate requested information. Public authorities are allowed to charge for providing this service, but, as the Aarhus Convention stipulates, such charge should be “reasonable”.<sup>167</sup> Applicants are given guarantees to ensure that, if they disagree with a decision to retain information or consider that their request for information has been inadequately answered, they can command the review of the decision by both an administrative body and by a court of law.<sup>168</sup>

The EU has also adopted legislation to incorporate the Aarhus Convention provisions regarding public participation, with the Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC. This text asks EU Member States to give increased opportunities to the public to express their opinion on plans and programmes for environmental policy, including

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<sup>167</sup> Article 5, *Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/EEC*.

<sup>168</sup> Article 6, *Ibid.*



both measures that directly aim to protect the environment and activities that may have an impact on the environment.<sup>169</sup>

Significant precedents to this Directive on public participation are the Environmental Impact Assessment Directive<sup>170</sup> (EIA Directive) and the Strategic Environmental Assessment Directive<sup>171</sup> (SEA Directive). The EIA directive demands EU Member States to ensure that all private and public projects, plans and programmes with significant impact on the environment analyse and provide information on the potential environment impact of such projects.<sup>172</sup> For its part, the SEA Directive mandates that an assessment of environment impact is also carried out with plans and policies that set the framework for future development in certain sectors, including agriculture, forestry, fisheries, energy, industry, transport, waste/ water management, telecommunications, tourism, town & country planning and land use.<sup>173</sup> Crucially for the purpose of the present report, both directives have demanded Member States to ensure public participation in the decision making process. Member states need to identify the appropriate authorities with relevant interests in the project or policy area, which are entitled to provide an opinion

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<sup>169</sup> Article 2, Directive 2003/35/Ec of the European Parliament and of the Council of 26 May 2003 Providing for Public Participation in Respect of the Drawing up of Certain Plans and Programmes Relating to the Environment and Amending with Regard to Public Participation and Access to Justice Council Directives 85/337/Eec and 96/61/Ec.

<sup>170</sup> Council Directive 85/337/Eec of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment.

<sup>171</sup> Directive 2001/42/Ec of the European Parliament and of the Council of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment.

<sup>172</sup> Article 2 (as amended), Council Directive 85/337/Eec of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment.

<sup>173</sup> Article 3, Directive 2001/42/Ec of the European Parliament and of the Council of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment.

of the effects of implementing the plans and programmes.<sup>174</sup> The arrangements for consultation and information are established by the Member State.<sup>175</sup> The final decision needs to take account of the input by the consulted parties.<sup>176</sup> In this sense, the Directive on public participation has expanded the instances when the public is to be consulted regarding environmental policies.

Finally, the Commission has presented the EU Parliament and the Council with a proposal for a directive on access to justice in environmental matters.<sup>177</sup> This proposal aims to guarantee the existence of minimum mechanisms for the public to intervene in the enforcement of environmental laws, and by doing so, to “compensate for existing shortcomings in the application of environmental law”,<sup>178</sup> as well as to align EU environmental law with the provisions of the Aarhus convention.<sup>179</sup> The proposed directive grants the right to initiate a proceeding to member of the public “with sufficient interest”<sup>180</sup> and to “qualified entities”<sup>181</sup> – environmental associations and organisations - which need to be legally recognised by the Member State according to some criteria established in the directive. However, little progress has been achieved since the issuing of the proposal, undoubtedly caused by the difficulties of finding common agreement on an issue that goes to the core of powers and

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<sup>174</sup> Article 6.3, Ibid. Also, article 6 of *Council Directive 85/337/Eec of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment*.

<sup>175</sup> Article 6.5, *Directive 2001/42/EC of the European Parliament and of the Council of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment*.

<sup>176</sup> Article 8, Ibid. Also, article 8 *Council Directive 85/337/Eec of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment*.

<sup>177</sup> Commission of the European Communities, "Proposal for a Directive of the European Parliament and of the Council on Access to Justice in Environmental Matters," in COM (2003) 624 final (Brussels: Commission of the European Communities, 2003).

<sup>178</sup> Ibid., 5.

<sup>179</sup> Ibid., 4.

<sup>180</sup> Ibid., 8.

<sup>181</sup> Ibid.

responsibilities enjoyed by the judicial systems of the EU Member States. Although the signatories of the Aarhus convention are subject to its provisions regarding to access to justice on environmental matters, EU Member States have been resistant to translate the Convention's measures into an EU directive.

### 3.2. Procedural standards for water policy

Apart from the legislation for the implementation of the Aarhus Convention, other sector specific legislation such as the Water Framework Directive has created procedural obligations for the development of water policies. Apart from setting substantive standards, the WFD has taken up the requirements of the Aarhus Convention. The WFD requires EU Member States to provide for the "active involvement of interested parties" in the implementation of the Directive, particularly in the development of the River Management Plans.<sup>182</sup>

The active involvement of interested parties has consisted in the provision of information on any measures for river basin management and the initiation of consultation for projects with an impact on the water environment.<sup>183</sup> The general public, consumers, environmental association, but also of all Water Services Providers, are the stakeholders that need to be involved in the implementation of the WFD. The directive includes minimum standards for information and consultation. It indicates what issues the public needs to be informed and consulted about, and it defines a framework for consultation. Thus, for instance, Member States need to publish, for each river basin, "a

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<sup>182</sup> Article 14, *Directive 2000/60/Ec of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy*.

<sup>183</sup> *Ibid.*

timetable and work programme for the production of the plan [...] at least three years before the beginning of the period to which the plan refers".<sup>184</sup> Also, they are required to publish draft copies of the river basin management plan, at least one year before the beginning of the period to which the plan refers.<sup>185</sup> River Basin Plans need to be made available for consultation to the public at least six months to allow for comment in writing.<sup>186</sup> In this sense, the WFD has created detailed obligations on the EU Member States on the procedures that they need to comply with when developing water resources policies and management plans. Water users are closely involved via consultation in all measures regarding the management of resources of all European rivers.

#### 4. CONCLUSIONS

EU legislation has established substantive and procedural standards for the provision of water services in the EU. Regarding the substantive standards, EU legislation has mainly developed minimum requirements for environmental regulation destined to protect the status of water bodies across the EU, and social regulation aiming at guaranteeing quality and safety in the drinking water supplied to EU population. As for procedural standards, EU legislation has developed as a result of the signing by the EU of the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters. This treaty has prompted the adoption of EU legislation aiming to facilitate the involvement of water users into decision-making processes for national water and environmental policies. Thus, the WFD has developed as a piece of legislation that provides singular

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<sup>184</sup> Article 14.1 (a), *Directive 2000/60/Ec of the European Parliament and of the Council of 23 October 2000 Establishing a Framework for Community Action in the Field of Water Policy*.

<sup>185</sup> Article 14.1 (c), *Ibid.*

<sup>186</sup> Article 14.2, *Ibid.*

opportunities for the public to participate, via consultation, in the decision-making process for river basin management, including measures for abstraction, pollution control, and infrastructure development.

## CHAPTER 4. ENGLAND

### 1. INTRODUCTION

The United Kingdom comprises the four countries of England, Wales, Scotland and Northern Ireland. The institutional and regulatory framework for water policy is the same in England and Wales, and sharply distinct from the institutional competences in Scotland and Northern Ireland. This chapter focuses exclusively on England, where around 24 million properties are connected to the water networks.

The institutional and regulatory framework for water regulation in England was created in 1989 after the complete divestiture of the public assets of the water industry. Under this new system, the national government maintains an arm's length relation with a privatised water industry, and new regulatory agencies oversee the economic and environmental activities of 10 water and sewerage companies operating within regional monopolies and of 21 companies providing only water supply in different areas of the country.

This chapter analyses water governance in England. It finds that water governance in England is characterised by the existence of robust provisions for transparency of information. The publication of detailed information about the regulation and the activities of the industry provide water consumers with opportunities to know about the functioning of the water operators and the rationale behind regulatory decisions. This information, however, requires specialised knowledge, as it refers to matters related to operational and financial status of the water companies. As for water users' participation and

access to justice, the English regulatory framework favours the intermediation of Consumers Associations – the Consumer Council for Water, which articulates the position of the average consumer in the decision-making process, and is entitled to intercede on their behalf to correct a decision.

Demographic data	
<b>Total population</b>	59 million (UK data)
<b>Urban population (%)</b>	89% (UK data)
<b>Number of households</b>	24 million

Natural resources data	
<b>Water availability per person per year</b>	2,395 m <sup>3</sup> <sup>187</sup>
<b>Average water use per person per day</b>	146 litres <sup>188</sup>
<b>Average water bill</b>	£346.64/year <sup>189</sup>

Allocation of roles between public authorities	
<b>Responsible body for drinking and waste water provision</b>	Department for the Environment, Food and Rural Affairs
<b>Other relevant authorities</b>	Drinking water inspectorate
	Ofwat
	Environment Agency

Management models for water utilities	
<b>Types of operators active in the country</b>	10 Water services companies (water and sewerage service providers)
	11 water only companies
<b>Infrastructure ownership</b>	Private operators
<b>Forms of public-private partnership</b>	N/A

## 2. INSTITUTIONAL FRAMEWORK

The institutional framework of water services provision in England is composed by several private water and sewerage companies, the national

<sup>187</sup> Data for the whole UK, Food and Agriculture Organization of the United Nations, "Aquastat," <http://www.fao.org/nr/water/aquastat/data/query/index.html?lang=en>.

<sup>188</sup> Food and Rural Affairs Department for Environment, "Domestic Water Consumption," <http://www.defra.gov.uk/sustainable/government/progress/national/16.htm>.

<sup>189</sup> OFWAT, "Average Household Bills 2008-09," OFWAT, [http://www.ofwat.gov.uk/consumerissues/chargesbills/prs\\_inf\\_avercharges2008-09.doc](http://www.ofwat.gov.uk/consumerissues/chargesbills/prs_inf_avercharges2008-09.doc).

government, and the economic regulator. They are the core national organisations in charge of ensuring drinking water supply and sewerage for all consumers. Along with these actors, the Consumers Council for Water, the Environment Agency and the Drinking Water Inspectorate participate actively in the water tariff setting via a consultation process, and fulfil important roles as environmental and water quality standard setters.<sup>190</sup>

### 1.1. Water and Sewerage and Water only Companies

Since 1989, ten privatised Water and Sewerage Companies (WaSCs) in England are in charge of providing water supply of water to about 75% of population and the waste water disposal to all users.<sup>191</sup> The WaSCs operate as vertically integrated regional monopolies. They provide services to customers, from extraction of raw water, water supply, collection, treatment and discharge of wastewater. In addition another 11 Statutory Water Companies (or water-only companies) supply water to around 25% of population of England, in different areas of the country. All water companies belong to Water UK, which is the industry association that represents UK water and wastewater service suppliers at national and European level.<sup>192</sup>

At privatisation, all water-only and WaSCs became public limited companies, with the core business of providing water services in their operating region.

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<sup>190</sup> For further information on English institutional framework, see Yvonne Rees and Thomas Zabel, "United Kingdom," in *Water Resources Management*, ed. Antonio Nunes Correa (Taylor & Francis, 1998).

<sup>191</sup> Anglian Water Services Ltd, Dwr Cymru Cyfyngedig (Welsh Water), Northumbrian Water Ltd, Severn Trent Water Ltd, South West Water Ltd, Southern Water Services Ltd, Thames Water Utilities Ltd, United Utilities Water Plc (previously North West Water), Wessex Water Services Ltd, Yorkshire Water Services Ltd.

<sup>192</sup> See Water UK, "Working on Behalf of the Water Industry Towards a Sustainable Future," <http://www.water.org.uk>.



Since, every water company has a licence agreement that allows them to supply in certain designated areas for 25 years. The licence obligates all water undertakers to comply with any direction given by OFWAT's Director, the Secretary of the State and, in certain cases, by the Competition Commission.<sup>193</sup> These directions include performance standards a price cap for the services that they provide to consumers.

### 1.2. The national government

The national government is in charge of all aspects of water policies in the UK.<sup>194</sup> The Department for Environment, Food and Rural Affairs (DEFRA) is the responsible government department for regulating the water sector in the country. The head of DEFRA, the Secretary for the Environment, Food and Rural Affairs represents the UK government at the EU level and is accountable to Parliament.<sup>195</sup>

National government's competences for the water sector are extensive. It is in charge of protecting all resources in England and Wales, of establishing the regulatory systems for the water sector, carrying out functions as environmental strategic planner and implementing European directives.<sup>196</sup> Concerning the water industry, all major decisions on improvements to the industry, and to meet national or European standards, are made by the national government and its Ministers.<sup>197</sup> In addition, the national government

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<sup>193</sup> Art 11 and 12, *Water Industry Act 1991*.

<sup>194</sup> See Department for Environment Food and Rural Affairs, "About Defra," <http://ww2.defra.gov.uk/corporate/>.

<sup>195</sup> See Defra website at Department for Environment Food and Rural Affairs, "Ministers," <http://ww2.defra.gov.uk/about/ministers>.

<sup>196</sup> Article 2A *Water Industry Act 1991*.

<sup>197</sup> Article 2, *Ibid*.

appoints<sup>198</sup> and supervises the activities of the regulators.<sup>199</sup> Therefore, the preferences and the role of the national government are fundamental in the setting of water prices and water quality standards.

### **1.3. The Office of Water Services/Water Services Regulation Authority - OFWAT**

The Office of Water Services (OFWAT) was created in 1989.<sup>200</sup> It is a national non-ministerial government department in charge of the economic regulation of the water industry. As such, OFWAT is in charge of controlling anti-competitive behaviour from water companies and industry concentration, in order to prevent monopoly abuse by the water companies. With this aim, it monitors and regulates water companies' charges and level of service. OFWAT is funded by water and sewerage customers through an annual licence fee, which is recovered from the water companies' bills.

OFWAT's primary duty is to ensure that the companies can finance their activities by "securing reasonable returns on their capital".<sup>201</sup> To do so, OFWAT recreates a comparative competition regime by measuring and contrasting the performance of all water companies. OFWAT has developed a series of indicators that inform about the performance of the companies, which allows the comparison of the performance of the different regional monopolies when setting performance targets and price limits.<sup>202</sup>

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<sup>198</sup> Article 6, Ibid.

<sup>199</sup> Chapter II, Part II, Ibid.

<sup>200</sup> Part 1 Ibid.

<sup>201</sup> Section 2.2.b, Ibid.

<sup>202</sup> See OFWAT, "Comparative Reporting," <http://www.ofwat.gov.uk/regulating/reporting>.

From 1989 to April 2006, OFWAT was headed by a General Director, who had full responsibility over the activities carried out by the organisation, and reported to Parliament and not to the national executive. In 2006, by virtue of the Water Act 2003, the Office of Water Services was taken over by the Water Services Regulation Authority, which is a body corporate that took over the regulatory functions of the Office of Water Services.<sup>203</sup> In line with the UK's best practice on regulation, the Government considered that a regulatory Board, and not a Director General (as was the case with the Office of Water Services) might be a more appropriate structure to reduce arbitrary policy shifts and to encourage a more consistent and transparent approach to regulation. Thus, since 2006, OFWAT is led by a Board of nine members, including the Chairman and the Chief Executive, appointed in the terms established by the Secretary of State for the Environment.<sup>204</sup> The new revised Authority is still commonly referred as OFWAT.

Along with those bodies for the provision of water services, since October 2005 the **Consumer Council for Water (CCWater)** represents water and sewerage consumers in England and Wales.<sup>205</sup> CCWater is a statutory water consumer body, and operates as a non-departmental public body reporting to DEFRA. Before 2005, consumers' interests were represented by WaterVoice, which made part of OFWAT's organisational structure and disappeared with the adoption of the Water Act 2003. The CCWater has extra duties and more power than its predecessor WaterVoice.<sup>206</sup> Its competences and functions are established in Water Act 2003, and included the power to request information

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<sup>203</sup> Section 34, *Water Act 2003*.

<sup>204</sup> Schedule 1 *Ibid.*

<sup>205</sup> Section 27A, *Ibid.*

<sup>206</sup> Schedule 2, *Ibid.*

from water companies and OFWAT, scrutinise the work of decision makers; promote best practice by influencing the water industry to improve service delivery to consumers; collect the views of the public; provide advice and information on the work of water services provision, and to publish water and sewerage service information from information collected.<sup>207</sup> Hence, CCWater responsibilities relate to the gathering and dissemination of information about the functioning of water services companies.

Whereas not directly involved in the regulation of water services provision, the **Environmental Agency** (EA) participates in the regulation of the water industry. With around 13500 staff, the EA is one of the largest environmental regulators in Europe.<sup>208</sup> Its main responsibility is to secure the proper use of water resources in England and Wales - along with other air and soil quality regulatory functions.<sup>209</sup> To do this, it develops and enforces water quality standard in inland, estuarial and coastal waters, under the direction of the national government. The EA issues permits, licences, consents and registrations ranging from major industrial authorisations to recreational ones such as fishing licences. The EA is funded by the Secretary of State for the Environment, via the national budget.<sup>210</sup>

In addition, the **Drinking Water Inspectorate** (DWI) was set up in 1990 as the body in charge of regulating public water supplies in England and Wales. The DWI is part of the Department for Environment, Food and Rural Affairs

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<sup>207</sup> Schedule 3A, Ibid.

<sup>208</sup> Environment Agency, "What We Do," <http://www.environment-agency.gov.uk/aboutus/work/35696.aspx>.

<sup>209</sup> Sections 5, 6, and 7, *Environment Act 1995*.

<sup>210</sup> 60% of funding comes from government, and most of the rest comes from various charges schemes. From Environment Agency, "What We Do."

(DEFRA).<sup>211</sup> To carry out its duties, the DWI receives regularly information from the water companies, and makes an annual assessment of the quality of drinking water supplied by the companies. The DWI also inspects water companies and collects water samples to be sure that the results are reliable. The DWI compares the results against the standards. Moreover, the DWI also investigates consumers' complaints on drinking water, to detect incidents that may have affected the quality supplied to consumers. So, the regulatory functions of the DWI have an impact on the price and the service quality standards that water consumers enjoy in England.<sup>212</sup>

### 3. LEGAL FRAMEWORK

The regulatory framework for water services provision currently in force has evolved since 1989, when the water services industry was disvested. The *Water Industry Act 1991* and the *Water Resource Act 1991* established the basis for the new framework after the privatisation of the ten regional water authorities that provided water services until 1989. These two legal norms created the framework for the environmental and economic regulation of the newly privatised water sector.

The Water Industry Act 1991 sets up and gives competences to the economic regulator of the water industry – the Director General of Water Services (OFWAT),<sup>213</sup> and of the water and sewerage companies.<sup>214</sup> The Water Industry Act 1991 is also the legal text that establishes main conditions for price and

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<sup>211</sup> Drinking Water Inspectorate, "About Us," <http://www.dwi.gov.uk/about/index.htm>.

<sup>212</sup> Drinking Water Inspectorate, "What We Do," <http://www.dwi.gov.uk/about/what-we-do/index.htm>.

<sup>213</sup> Part 1 and in Schedule 1, *Water Industry Act 1991*.

<sup>214</sup> Parts 2 to 4 and 6, *Ibid*.

charges settings; it gives the power to fix water charges to all water undertakers, within the price limits set by the economic regulator.<sup>215</sup> The Water Industry Act 1991 was modified by the *Water Industry Act 1999*, which gives new rights for water consumers, particularly household customers, in matters such as the prohibition to disconnect water supply for reasons of non-payment, the choice as regards having metered or unmetered water supply.<sup>216</sup>

For its part, the Water Resources Act 1991 establishes water quality objectives, characterises pollution offences and defines conditions for abstraction and impounding. It also created the National Rivers Authority (NRA), which was the environmental regulator that held responsibilities for the definition of the conditions for protection of the quality of the aquatic environment in England and Wales. In 1996, by virtue of the *Environment Act 1995*, the NRA was substituted by a new reinforced environmental regulator, the Environment Agency.

The Water Resource Act 1991 was again modified by the *Water Act 2003*, which abolished the Office of the Director General of Water Services and created the Water Services Regulation Authority – as seen above. The Water Act also established the Consumer Council for Water as the body representative of water users' interests, substituting WaterVoice as the association of water users in England and Wales.<sup>217</sup>

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<sup>215</sup> Sections 142-143, *Water Industry Act 1999*.

<sup>216</sup> Sections 142 to 150, *Ibid*.

<sup>217</sup> Section 35 and 36, *Water Act 2003*.

#### 4. PRICE AND SERVICE QUALITY STANDARD SETTING PROCEDURE

Water and sewerage companies in England operate as monopolies in the areas identified in their licence. As service providers, water companies have to meet certain standards of environmental protection, drinking water quality, and water service standards, established by the Environment Agency, the DWI and OFWAT, operating under the direction of the national government. The costs of providing a service to the standards that the regulators require are passed on to the consumers; water companies are entitled to fix charges applicable both to metered and non-metered consumers using their services. They have, nonetheless, to receive the approval of OFWAT, which is responsible of setting a maximum water price that companies have to observe. The regulators, therefore, set the framework that water companies need to respect, and monitor that water companies fulfil these requirements. They are also entitled to issue sanctions if they identify that water companies have not met their service quality standards.

OFWAT sets the maximum prices for water services at the Periodic Water Price Review. The Periodic Water Price Review was established at privatisation to agree on K factor, i.e. the water charges limits that companies can impose on their customers. No legal text defines the procedure to follow in setting the K factor, which has been developed over time following a modified regulatory model proposed by Stephen Littlechild for the telecommunications industry.<sup>218</sup> The mechanism for setting price limits is known as RPI+K, where RPI is retail

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<sup>218</sup> S Littlechild, "Economic Regulation of Privatised Water Authorities and Some Further Reflections," *Oxford Rev Econ Pol* 40, no. 2 (1988).

price index and K the allowable price increase.<sup>219</sup> According to its regulatory functions, OFWAT needs to ensure that this maximum price allows water companies have sufficient financial resources to meet all the required environmental and water services standards, while, at the same time, protecting consumers's interests.<sup>220</sup>

Price reviews take place every five years. OFWAT, as the economic regulator, has developed, tested and modified the procedure in the four Water Price Reviews that have happened since privatisation, which is divided into four main stages<sup>221</sup>:

First, the national government publishes its objectives for the running of the water industry for the period covered in the Price Review. These objectives relate to standards for water provision, resources, pollution, treatment, etc, and reflect the preferences of the national governments for the sector, which needs to ensure that water standards meet minimum requirements set at EU level.

Secondly, as part of the Price Reviews, water companies are asked to submit their estimates and forecasts of the costs to meet the government requirements. This information includes data about their operating expenditure and capital investment programme, such as key outputs (restrictions on water use; low pressure; interruptions; flooding from sewers; responses to billing queries, complaints procedures), non-financial issues (population supplied, new

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<sup>219</sup> See OFWAT, "Water and Sewerage Bills - How They Are Controlled," [http://www.ofwat.gov.uk/consumerissues/chargesbills/prs\\_inf\\_wandsbills](http://www.ofwat.gov.uk/consumerissues/chargesbills/prs_inf_wandsbills).

<sup>220</sup> Article 2, *Water Industry Act 1991*.

<sup>221</sup> For an overview of the process, see OFWAT, "Price Review," <http://www.ofwat.gov.uk/pricereview/>.



connections, water sources, volume of water delivered, collected, treated, etc), regulatory accounts (profit, loss and cash flows) and financial measures.<sup>222</sup>

OFWAT subsequently evaluates the information given by the water companies and their forecasts on future needs. In doing so, it compares the operating and financial actual and forecasted performance of the companies, which allows an evaluation of the functioning of the companies. With this information, OFWAT finally decides upon a water price rise that is acceptable to both customers and the water companies, that is, that meets a balance between ensuring the financial viability of the companies whereas at the same time keeping water tariffs as low as possible for water consumers.

## **5. WATER GOVERNANCE IN ENGLAND**

### **5.1. Access to information**

The regulation of private utilities relies on the gathering and publication of information about the activities of these operators. Access to information is crucial for the regulators, as it allows controlling the activities of the private companies. The government and regulators collect information on the activities, views and vision of water services operators. But, to what extent is this information available to water consumers?

Since its creation, OFWAT requires water companies to submit information on the activities and operations that they carry out. The regulator determines the content and the format of the information that water companies need to produce, and reports on their levels of service standards, encompassing many

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<sup>222</sup> OFWAT, "Information for Regulation, Vol.1," (Birmingham: OFWAT, 1995).

different aspects that OFWAT has classified into four categories: information on water supply, on sewerage service, on customer service and on environmental performance.<sup>223</sup> With this information, OFWAT compares the activities carried out by the private companies, and assesses to what extent they have successfully meet the water service operation requirements, as well as allows the setting of water price limits. However, as giving information about their service might lead to an enforcement action, OFWAT needs to ensure that water companies do not retain or give inaccurate information to avoid disciplinary action. OFWAT approves the appointment of water companies' reporters, who are professional commentators and certifiers on the regulated activities of the companies. They ensure that company regulatory information is consistent, comparable, reliable and accurate.<sup>224</sup> The law also includes provisions to punish any person that makes false statements on information required by the regulators,<sup>225</sup> and has given powers both to OFWAT and to the Secretary of State to acquire information they may require to carry out disciplinary actions against companies.<sup>226</sup>

Throughout the price setting process, OFWAT publishes reports on the information it collects from water companies, with the aim of adding transparency to the process of setting water price and water quality standards.<sup>227</sup> The information is open to scrutiny by other regulators, consumer associations and the public at large. In particular, OFWAT website provides a

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<sup>223</sup> OFWAT, "Information for Regulation and the June Return, Information N° 1 1996 (Revised in 2004) " (Birmingham: OFWAT, 1996). House of Lords Select Committee on Regulators, "Uk Economic Regulators, Vol Ii, 1st Report of Session 2006-07," (2007).

<sup>224</sup> OFWAT, "Reporters to Ofwat - Reporters Protocol. Issue 2," (Birmingham: OFWAT, 2003).

<sup>225</sup> Article 207, *Water Industry Act 1991*.

<sup>226</sup> Article 203, *Ibid*.

<sup>227</sup> Article 192A, *Ibid*.

large archive of electronic documents that OFWAT collects to inform its decisions, plus information on the procedures the regulator follows to reach those decisions. In addition, after deciding on the K factor, OFWAT publishes the reasoning behind major regulatory decisions, both electronically and on paper.

The obligation to inform on the reasons for a decision is also protected by law. In the case of modifications of certain key decisions such as the conditions of the appointment, the licence, the termination or revocation of a licence, etc. the Secretary of State is obliged to inform about the reasons for the decision to all the persons likely to be interested.<sup>228</sup>

Water consumers have their right of information facilitated by the actions of the Consumer Council for Water (CCWater). National regulations give a function to the CCWater to provide information and advice to consumers on matters of their interest.<sup>229</sup> They are entitled to carry out these tasks any manner that the Council thinks appropriate, without contravening any restriction on disclosure of information.<sup>230</sup>

If consumers consider that the information that OFWAT provides on the activities of the water companies is not enough, they are entitled to demand access to information that OFWAT holds, by virtue of the *Freedom of Information Act 2000*. The Freedom of Information Act 2000 is the main law

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<sup>228</sup> Article 195A, Ibid.

<sup>229</sup> Article 27F, Ibid.

<sup>230</sup> Article 27G, Ibid.

regulating access to information in England.<sup>231</sup> The Act establishes the right to receive information held by public authorities and the duty of public authorities to provide information requested by any person.<sup>232</sup> This duty does not include the information kept by private water companies, although some consultation has been carried out to assess whether to extend the coverage of the Act, to include organisations that, whilst private, provide a public service – such as the water companies.<sup>233</sup> In this sense, for information on the water industry, the Freedom of Information Act 2000 applies to all information held by government departments, OFWAT, DWI and the Environment Agency.

The Freedom of Information Act 2000 regulates the conditions applicable to disclose public information. By virtue of this Act, public authorities are required to make available in the public domain all licences, contracts and documents that provide information on the activities they carry out. If the decisions/reasons are not published, the consumers have the right to demand access – or make a “request of information”, under certain conditions.<sup>234</sup> Thus, any person is entitled, upon request, to receive information held by public authorities in writing and within a timeframe clearly set.<sup>235</sup>

Whereas the Freedom of Information Act protects the right to access to information and commands public authorities to provide information to the public, the Act also recognises the existence of valid reasons for withholding some kinds of information. Part II of the Freedom of Information Act

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<sup>231</sup> *Freedom of Information Act 2000*.

<sup>232</sup> Article 1, *Ibid*.

<sup>233</sup> Ministry of Justice, "Freedom of Information Act 2000: Designation of Additional Public Authorities," <http://www.justice.gov.uk/consultations/cp2707.htm>.

<sup>234</sup> Article 8, *Freedom of Information Act 2000*.

<sup>235</sup> Article 10, *Ibid*.

establishes that when disclosure of trade secrets would damage some private interest, access to information can be denied. Thus, by virtue of some exceptions in the Freedom of Information Act 2000, some categories of information can be considered confidential. For instance, if the publication of information might have an effect on share prices, an exception can be granted, thus precluding water consumers to access information. Also, when information is commercially confidential, access to information may also be limited.<sup>236</sup> Such are the cases when the excised information could give competitors, potential competitors or third parties a commercial advantage, and when the organisation(s) concerned has/have not given consent for this information to be put into the public domain. So water companies are entitled to ask for confidentiality to the economic regulator, so sensitive information is not made available in the public domain.<sup>237</sup> Further to these provisions of the Freedom of Information Act, the Water Industry Act 1991 also indicates the existence of restrictions on disclosure of certain information, such as the need to obtain express consent from the individual or business affected.<sup>238</sup>

Along with the Freedom of Information Act 2000, in 2004 the Houses of Parliament approved the *Environmental Information Regulations 2004*, a statutory instrument that transposes into national legislation the content of the Council Directive 2003/4/EC on public access to environmental information and repealing Council Directive 90/313/EEC.<sup>239</sup> The Regulations create an obligation on government departments and public authorities to disseminate

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<sup>236</sup> Art 43, *Ibid.*

<sup>237</sup> See Martin Fitch and Cosmo Graham, "The Draft Freedom of Information Bill- Implications for Utilities," *Utilities Law Review* 10, no. 6 (1999).

<sup>238</sup> Article 206, *Water Industry Act 1991*.

<sup>239</sup> *The Environmental Information Regulations 2004*.

environmental information and to make it available upon request.<sup>240</sup> They establish the conditions applicable for this obligation, including the format in which information must be provided,<sup>241</sup> time schedule,<sup>242</sup> and exceptions to the duty to disclose information.<sup>243</sup>

England has developed mechanisms to protect the right of access to public information. If water consumers consider that their right to access water-related information is breached, they can appeal to the **Information Commissioner** to restore this right. The Information Commissioner Office was set up to supervise the application of the Freedom of Information Act 2000. The Office is an independent body in charge of carrying out investigations on complaints from people who are unsatisfied with the way public authorities have handled requests for information under the Freedom of Information Act.<sup>244</sup> The Commissioner is appointed by the Head of State, on advice from the Prime Minister (who is, in turn, advised by the Secretary of State for Justice following a selection process undertaken by his Department and validated by the Office of the Commissioner for Public Appointments). The appointment is for a five-year term. Thus, the Commissioner is competent to investigate cases that water consumers may raise. S/He also holds enforcement powers, which entails that the Commissioner can prosecute those who commit offences relating to access to information. Legal sanctions can be issued against public

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<sup>240</sup> Part 2, Ibid.

<sup>241</sup> Regulation 6, Ibid.

<sup>242</sup> Regulation 5, Ibid.

<sup>243</sup> Part 3 Ibid.

<sup>244</sup> In 2001, the Data Protection Commissioner and the Data Protection Registrar were given new responsibilities and changed their name to the Information Commissioner and the Information Commissioner's Office.

authorities, such as the government and OFWAT, that ignore or refuse to accept their obligation to disclose information.<sup>245</sup>

Accessing information is usually free, so consumers do not need to pay for the documents reporting on the activities of the regulator and the water companies. Consumers do nonetheless face the costs of information via water bills, as a portion of their charges is destined to compile and make information available. In certain cases, the public authority can impose a fee for the costs incurred in providing the information.<sup>246</sup> These charges are exclusively justified because of the cost of complying with the obligation to facilitate access to information. Public authorities can also refuse a Freedom of Information request if the resources required to gather the information are 'disproportionate'.<sup>247</sup>

In this sense, the English regulatory system ensures that water consumers can access to information that public authorities have collected on the activities of the water private companies. The available information is, nonetheless, highly specialised. It requires a high degree of expertise in regulatory and technical matters to fully understand and assess the relevance and validity of the information that OFWAT makes available: financial and operation assessments, as well as decisions of capital investment are all taken into account by the regulator to set water prices. The volume and the nature of the information available make it difficult for the lay person to judge on the appropriateness of a regulatory decision. In addition, despite the efforts to

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<sup>245</sup> Article 52 *Freedom of Information Act 2000*.

<sup>246</sup> Art 13, *Ibid*.

<sup>247</sup> Article 13.1.a *Ibid*.

make available a large volume of information to the public, the British Parliament has considered that OFWAT has used confidentiality clauses excessively, effectively limiting operational transparency in the water sector.<sup>248</sup>

## **5.2. Public participation**

Water consumers have a recognised right to participate in the establishment of water price and quality standards in England. Legal provisions exist to ensure that consumers have opportunities to participate in consultations initiated by the central government, by the Environment Agency and by OFWAT, destined to set service standards and price limits.

Indeed, consumers can participate in the consultation procedures initiated by the Government. DEFRA's consultations refer to overarching policy objectives for the water sector, including issues such as environmental and consumer protection, which have an impact on water tariffs and consumer standards. Recently, for instance, DEFRA has opened consultations on "competition and innovation in water markets" to collect the opinion of key stakeholders on how to improve the water supply licensing regime for large non-household customers and organise a new license appointments regime.<sup>249</sup> DEFRA has also consulted on the recent Flood and Water Management Bill, which aims to

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<sup>248</sup> House of Commons, "Environmental Audit - Seventh Report," <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmselect/cmenvaud/597/59703.htm>

<sup>249</sup> See Food and Rural Affairs Department for Environment, "Consultation on the Cave Review of Competition and Innovation in Water Markets " <http://www.defra.gov.uk/corporate/consult/cave-review>.



ensure that water companies control more non-essential uses of water during droughts.<sup>250</sup>

The characteristics of the consultations by DEFRA are spelled out in the Cabinet Office Code of Practice on Written Consultation. This document was drafted by the Cabinet Office to guide all governmental consultations.<sup>251</sup> The Code of Practice includes minimum requirements guiding government departments, such as a minimum consultation period of 12 weeks and the inclusion of a Regulatory Impact Assessment when the governmental proposals may create burdens for business. The contributions are published online, for everybody to have access. According to this Code of Practice, the government is required to give feedback to the responses received, and refer to how they have influenced the policy. Hence, although not guaranteed by law, consumers have in practice opportunities to discuss their preferences in the consultations initiated by the government.

The Environment Agency also follows the Cabinet Office Code of Good Practice for its consultations on environmental water standards. Concerning water, the Environmental Agency has opened consultation on issues such as river basin management and environmental permitting,<sup>252</sup> which effectively influence the duties and obligations of the private water companies – and thus the costs of providing their services. The Environment Agency has said to aspire to provide an individual response to every input by the public,

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<sup>250</sup> Food and Rural Affairs Department for Environment, "Consultation on the Draft Flood and Water Management Bill," Consultation on the Draft Flood and Water Management Bill.

<sup>251</sup> "Code of Practice on Written Consultation," ed. Cabinet Office (2000).

<sup>252</sup> For a list of consultations, see Environment Agency, "Consultations," <http://www.environment-agency.gov.uk/research/library/consultations/consultations.aspx>.

addressing to how and to what degree their decisions include the concerns raised by participants in the consultation, and to explain why certain contributions may have not been incorporated into the final decisions.<sup>253</sup>

As for OFWAT's consultations, the economic regulator is obliged to involve consumers in the major decisions and prior to implementing any key regulatory decisions.<sup>254</sup> Complying with the obligation of involving water users in its decision making process, OFWAT has opened the price setting and quality setting processes to stakeholders. The CCWater is entitled to represent the views and preferences of water consumers at large, and thus intermediates between consumers and the regulator when their participation is requested. For the Water Price Review, OFWAT indicates the instances when the CCWater can offer their opinions and views on major regulatory decisions, which are published in OFWAT's website.<sup>255</sup> Whereas OFWAT is not required by law to include the concerns raised by consumers, the regulator has tended to comment publicly on the points made in consultation responses and how these have affected the final decisions.

To facilitate participation, OFWAT has issued guidelines and information on consultations.<sup>256</sup> The guidelines do not specify what topics will be subject to consultation, but indicate the characteristics of OFWAT's consultations. In particular, depending on the nature of the topic consulted (whether broad matters of regulatory policy or more pointed issues) the consultation period

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<sup>253</sup> Ibid.

<sup>254</sup> In various articles, such as Article 30ZA Water Industry Act 1991.

<sup>255</sup> See OFWAT, "Consultations," <http://www.ofwat.gov.uk/consultations>.

<sup>256</sup> OFWAT, "Ofwat's Code of Practice on Consultations," (Birmingham: Ofwat, 2004).

will vary from 2 to 12 weeks.<sup>257</sup> The guidelines also establish conditions for how the text should be written (*i.e.*, in plain English) and the sections that it should contain (including a glossary, timetable, list of questions, etc.)<sup>258</sup>

In this sense, the English regulatory framework has facilitated the participation of water consumers in the spheres of pricing and service quality. Preference has been given to the input provided by CCWater, but consultations are also open for other organised consumers' associations. Their input, however, has been restricted to offering their opinion on their preferences, without any obligation from the regulators or the water companies to incorporate them in their decisions.

### **5.3. Access to justice**

Water consumers in England have a recognised right to access to justice if they consider the service to be falling short from certain standards, or if they disagree with a decision by the water companies, by the regulators or by the national government. Although consumers have opportunities to challenge the water companies' performance via both non-judicial means and at the courts, England's regulatory framework favours an internal and non-judiciary approach to review water services decisions. Appeals to courts are limited to some cases when non-judicial redress has failed.

Indeed, consumers who wish to complaint about water bills and levels of service are advised to approach their water providers first. The water company has to analyse the incident and decide on a possible compensation.<sup>259</sup>

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<sup>257</sup> *Ibid.*, 8.

<sup>258</sup> *Ibid.*, 9.

England has developed a statutory instrument to protect certain service standards.<sup>260</sup> These standards, known as the Guaranteed Service Standards, are set by the Government, and include a list of minimum requirements that water companies need to ensure, such as responding to account inquiries, and dealing with planned or unplanned interruptions to the water supply. If a company fails to meet any of the guaranteed standards, customers are entitled to a direct automatic compensation payment, without having to initiate any procedure – but reporting the incident. All other complaints raised by consumers are decided by the water company on a case-by-case basis. Consumers need to indicate the water company of the failure in the provision of the service.

If consumers disagree with a decision by OFWAT, they can also initiate internal appeals within the regulator. By means of OFWAT's internal procedures, consumers are invited to write to the Director of Finance and Business Services, and explain the cause of dissatisfaction and a proposal to put the matter right. OFWAT commits to investigate the concerns, and make amendments, if considered appropriate.<sup>261</sup>

DEFRA has also identified an internal procedure for consumers to complain about the department's standards of service – not substantive policy matters – consisting in contacting the relevant DEFRA division, and, this failing, the

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<sup>259</sup> OFWAT, "Complaints," <http://www.ofwat.gov.uk/consumerissues/complaints/>.

<sup>260</sup> *Water Supply and Sewerage Services (Customer Service Standards) Regulations 1989*, amended subsequently, most recently by SI 2008/594.

<sup>261</sup> OFWAT, "Unhappy with Our Service?," <http://www.ofwat.gov.uk/consumerissues/complaints/complaintreview/>.

Department's Impartial Complaint Adjudicator. This figure is responsible for investigating any complaints regarding standards of service, and is committed to providing a swift response.<sup>262</sup>

Apart from the measures internal to water companies, OFWAT and the government, external mechanisms have been envisaged for consumers who disagree with a decision or performance by the water companies, the economic regulator or the government: Water consumers may appeal to CCWater, to OFWAT, and to the Parliamentary and Health Service Ombudsman to try to redress their decisions.

Once the companies' internal complaints procedure has been exhausted, consumers can ask the CCWater to intervene if they consider that water companies have not responded appropriately to their concerns.<sup>263</sup> If the CCWater considers the complaint to be founded and within its jurisdiction (ie. a matter relating to the interests of consumers),<sup>264</sup> the CCWater can investigate consumers' complaints, enquiring both parts about the particular incident that has caused the complaint. If it considers that either OFWAT, the national government or any other actor should intervene, the CCWater can refer the case to the appropriate organisation. When the CCWater considers that the complaint is justified, it will ask the affected water company to restore the damage caused. If after the investigation it considers that the complaint has no

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<sup>262</sup>Food and Rural Affairs Department for Environment, "Complaints About Defra's Standards of Service,"

<http://www.defra.gov.uk/corporate/policy/opengov/complain/standards.htm>.

<sup>263</sup> Article 29 WIA; Consumer Council for Water, "Your Right to Complain," (Birmingham: Consumer Council for Water, 2009).

<sup>264</sup> Article 29A.1 *Water Industry Act 1991*.

fundament, it will proceed no further, but it will have to explain the reasons for their decisions to the customer.<sup>265</sup>

If after this procedure the water customers remain unsatisfied and do not reach a satisfactory agreement with the CCWater, customers may request the intervention of OFWAT.<sup>266</sup> OFWAT can mediate when consumers consider that the water companies are not complying with their statutory duties or license conditions, and in disputes between customers and water companies about laying water mains and sewers and collecting charges. OFWAT can require the water company to take a particular course of action, or may side with the company if it considers that their activities are lawful.<sup>267</sup>

In addition, if customers continue to disagree with a decision of the CCWater, OFWAT or DEFRA, they can refer the matter to the **Parliamentary and Health Service Ombudsman** (the Ombudsman)<sup>268</sup>. Since 1967, the Ombudsman carries out independent and free investigations into complaints about UK government departments and their agencies.<sup>269</sup> However, consumers cannot address directly the Ombudsman, but exclusively through their Members of Parliament. The Ombudsman can deal with complaints about the performance of all government department and public bodies. S/He can require the parts to

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<sup>265</sup> Section 47, *Water Act 2003*.

<sup>266</sup> Section 30, *Water Industry Act 1991*.

<sup>267</sup> *Ibid.*

<sup>268</sup> Parliamentary and Health Service Ombudsman, "Ombudsman's Principles," <http://www.ombudsman.org.uk/improving-public-service/ombudsmansprinciples>.

<sup>269</sup> *Parliamentary Commissioner Act 1967 (C.13)*. The Act has been extensively amended and modified. For a list of the modifying legislation, Parliamentary and Health Service Ombudsman, "Legislation for the Parliamentary Ombudsman," <http://www.ombudsman.org.uk/about-us/our-role/history-and-legislation/legislation-for-the-po>.

produce evidence relevant to the investigation, and also publish a report with their findings. Thus, the Ombudsman lacks formal coercive powers, but their influence works at a moral and reputational level. The evidence gathered by the Ombudsman can, nonetheless, be employed in court to back sanctions against CCWater, OFWAT and DEFRA.<sup>270</sup>

If water companies disagree with OFWAT's decision on the K factor, they are entitled to refer the dispute to the **Competition Commission**. Unlike water companies, consumers cannot ask directly for a review of the decision on a price cap. The Competition Commission is an independent public body established by the Competition Act 1998. Amongst its powers are to conduct inquiries into mergers and the regulation of major regulated industries, and to decide on final price limits for all utilities in the UK. The Competition Commission has powers to overrule OFWAT decisions and impose new price caps.<sup>271</sup> Thus, the Competition Commission can side with the decision of the OFWAT and the Government, or repeal a decision and set price caps higher or lower than established.<sup>272</sup>

Finally, any natural or legal person with "sufficient interest in the matter to which the application relates" may bring a claim for judicial review.<sup>273</sup> Judicial

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<sup>270</sup>The Parliamentary and Health Service Ombudsman, "Bringing a Complaint to the Parliamentary Ombudsman," (London: The Parliamentary and Health Service Ombudsman, 2009).in [http://www.ombudsman.org.uk/\\_data/assets/pdf\\_file/0008/1016/Bringing-a-complaint-to-the-Parliamentary-Ombudsman.pdf](http://www.ombudsman.org.uk/_data/assets/pdf_file/0008/1016/Bringing-a-complaint-to-the-Parliamentary-Ombudsman.pdf).

<sup>271</sup> *Competition Act 1998*.

<sup>272</sup> Section 12, *Water Industry Act 1991*.

<sup>273</sup> Section 31(3) of the Supreme Court Act 1981, quoted in Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, "Administrative Justice in Europe - Report for the United Kingdom," [http://www.juradmin.eu/en/eurtour/eurtour\\_en.lasso?page=detail&countryid=22](http://www.juradmin.eu/en/eurtour/eurtour_en.lasso?page=detail&countryid=22). See also

bodies can intervene to review the decisions taken by the regulators and the government, for either the setting of water prices or the establishment of service quality standards. The intervention of courts has, nonetheless, an extraordinary nature. Amongst the criteria for judicial review is the idea that a court will not “substitute its decision for that of the public authority, unless it is clear that there was only one decision that the authority could lawfully make”.<sup>274</sup> Therefore, a requirement of judicial review should start when there is no alternative available, so all formal mechanisms for review of the decision need to be exhausted before appealing a decision before a court.<sup>275</sup>

The cases that administrative courts deal with do not refer to the sufficiency or appropriateness of a regulatory measure. Judicial courts may intervene in cases when public authorities (such as OFWAT or the government) are accused of exceeding their powers, taking into account legally irrelevant matters, overlooking a matter that was required to consider, or abused their powers or acted unlawfully. In this sense, courts accept and decide on cases when the lawfulness of a decision is questioned.

Applying for judicial review has certain minimum costs, including £30 for lodging an application for judicial review, £180 further if the application is granted, and, in cases of permission to appeal, £200 to the court of Appeal. An independent body – the Legal Services Commission – contributes to covering legal fees of applicants with limited financial resources. The Legal Services

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Mr Justice Sullivan et al., "Ensuring Access to Environmental Justice in England and Wales," (2008).

<sup>274</sup> Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, "Administrative Justice in Europe - Report for the United Kingdom."

<sup>275</sup> Ibid.



Commission has established an income threshold under which applicants for judicial review are granted legal aid.

Overall, access to justice for disputes on water services standards in England has a highly restorative purpose, to promote compliance with already agreed measures. Consumers can seek restoration for cases whose lawfulness is in dispute. They are not entitled to appeal a tariff or customer standards, if it has been carried out according to the agreed procedures. Unlike water companies (through their actions to the Competition Commission), water consumers cannot dispute a regulatory decision on the basis of its appropriateness or adequacy.

## **6. CONCLUSIONS**

England has developed a singular framework for water services provision based on a delegated private management system. Private water companies are in charge of providing water supply and sewerage services, under the direction of the national government and national regulators - OFWAT, the Environment Agency and the Drinking Water Inspectorate - which are responsible for the adoption and monitoring of environmental and water quality standards of either EU or national origin.

The chapter has found that the English regulatory framework for water governance guarantees access to information for water consumers. Nearly all documents employed to define the regulatory setting procedure and to inform a regulatory decision are in the public domain, constituting a large body of documentation easily accessible to consumers. These documents require,

nonetheless, strong and accurate knowledge of the water industry, as they are highly specific and specialised, and thus difficult to interpret by the layperson.

The regulatory framework gives particular prevalence to water consumers associations such as CCWater, which act as an intermediary organisation mediating between regulators and water consumers at large. CCWater has kept an active role as participant in decision-making processes to set water prices and water service standards, and has monitored the activities of water companies to ensure that they perform within their regulatory remits. In no case, however, have the water consumers had co-decision powers.. Finally, regarding access to justice, the chapter has shown that the English regulatory system relies on administrative mechanisms for redressing consumers' concerns, and access to court justice is limited to highly controversial and disputed cases. The preference in the English regulatory framework has been for administrative palliative mechanisms to address consumers' concerns, and a case-by-case approach to investigate the issues they raise.

## CHAPTER 5. FRANCE

### 1. INTRODUCTION

France is a country of around 674,843 km<sup>2</sup> and over 64 million inhabitants. Local authorities (*communes*) are the responsible bodies for the provision of water and sewerage services in France.<sup>276</sup> In most cases, the *commune* delegates water provision to a private operator. This arrangement entails the public ownership of both the infrastructure and water, but the private management of operations and assets. Around 73% of all customers in France are provided water supply and sewerage services by a private operator.

The Ministry for the Environment, Ministry for Health and Ministry of Interior, are relevant authorities in the provision of water services in France. They are in charge of setting policy objectives for environmental protection, public health and infrastructure building, which may have a national or EU origin. Local authorities are responsible for the adoption of these standards so, in cases when the service is delegated, they have to ensure that water operators meet the minimum requirements.

The analysis of the system of water services governance in France shows how the regulatory system has developed mechanisms that favour the exchange of information between the responsible body (the local authority) and the water operator and make water companies accountable of their performance. When

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<sup>276</sup> Articles L2224-7-1 and L2224-8, *General Code of Territorial Collectivities (Code Général Des Collectivités Territoriales)*. Referred in this research as CGCT

the service is delegated, local authorities have to put in place means to ensure that the water operators carry out all the duties agreed in the delegation contract. They have done so by increasing the demands for information and by improving the means to make water companies accountable if they fail to comply with contract obligations. In this context, water consumers have had a secondary role in the decision making process. Channels for direct participation of consumers for water price setting and service quality standards have been created recently, but even in these cases, consumers maintain exclusively advisory roles. Water consumers have maintained largely subordinated roles to that of the local representatives, which are considered the legitimate actors for deciding on water services provision.

Demographic data	
<b>Total population</b>	60 million
<b>Urban population (%)</b>	76%
<b>Number of households</b>	26 million

Water resources data	
<b>Water availability per person per year</b>	3,284 m <sup>3</sup> <sup>277</sup>
<b>Average water use per person per day</b>	165 litres (2004) <sup>278</sup>
<b>Average water bill</b>	€305/year <sup>279</sup>

Allocation of roles between public authorities	
<b>Responsible body for drinking and waste water provision</b>	Municipal and supramunicipal level
<b>Other relevant authorities</b>	Ministries of Environment, Health, Interior for general laws and regulations
	6 River Basin districts + water agencies for water resources management

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<sup>277</sup> Food and Agriculture Organization of the United Nations, "Aquastat."

<sup>278</sup> Institut Français de l'Environnement, "La Facture D'eau Domestique En 2004 177 Euros Par Personne Et Par An," <http://www.stats.environnement.developpement-durable.gouv.fr/uploads/media/de117.pdf>.

<sup>279</sup> Commission des Finances de l'Economie Générale et du Plan, "Rapport D'information Sur Le Financement Et La Gestion De L'eau," (Assemblée Nationale 2000). In <http://www.assemblee-nationale.fr/legislatures/11/pdf/rap-info/i3081.pdf>

Management models for water utilities	
Types of operators active in the country	Direct public management
	Publicly owned entities
	Private operators under PPP contracts
Infrastructure ownership	Public authorities
Forms of public-private partnership	Operation and maintenance
	Lease
	Concession
	Public-private joint ventures

## 2. INSTITUTIONAL FRAMEWORK

The French local authorities are the bodies responsible for providing a safe supply of water to all inhabitants in their jurisdictions. The national government, the regional governments and the water basins authorities fulfil the role of relevant authorities, as they establish environmental and water quality standards that local authorities have to incorporate into the running of the service. Along with these territorial authorities, water and sewerage companies play a fundamental role in the provision of water services, as in most cases local authorities have opted to delegate water services functions to water operators. National and local consumers associations exist also to represent the interests and preferences of consumers, including matters of water price and service quality.

### 2.1. Local authorities- Communes

The French *communes* are responsible for distribution of drinking water and sewerage services provision.<sup>280</sup> As such, they are in charge of the maintenance and exploitation of all works and water infrastructures and for deciding on investment decisions. The local authorities also control water tariffs in their

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<sup>280</sup> Articles L2224-7 and L224-8, CGCT.

municipal areas, as they have to authorise water tariffs and any yearly water bill increase.

There are currently in France around 36,682 *communes*, a number significantly higher than any other EU country<sup>281</sup>. In the last 15 years, some local authorities have chosen to regroup their water supply and sanitation activities by creating inter-municipal cooperation organisations or “établissement public de coopération intercommunale” - in charge of providing water supply and sewerage services in larger geographical areas. As a result, the number of responsible authorities providing the service has descended from over 36,000 local authorities to around 13,500 responsible bodies, including inter-municipal associations and local authorities. In this report, the term “local authority” will refer both to municipalities and groups of municipalities or *communes*.

Local authorities can decide whether to provide water services directly or to delegate it to a water operator.<sup>282</sup> When local authorities provide the service directly, they may do so in different manners. *Régie directe* occurs when a section or department of the city council manages directly the water provision; *Régie à autonomie financière* takes place when an independent body, distinct from the council, is in charge of managing service. The provider has an independent budget, which needs nonetheless to be annexed to the local budget, and approved by the Council. Finally, *Régie à autonomie financière et*

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<sup>281</sup> Direction generale des collectivites locales, "Les Collectivités Locales En Chiffres 2010,"(2010), [http://www.dgcl.interieur.gouv.fr/sections/a\\_votre\\_service/statistiques/collectivites\\_locale/les\\_collectivites\\_lo3454/view](http://www.dgcl.interieur.gouv.fr/sections/a_votre_service/statistiques/collectivites_locale/les_collectivites_lo3454/view).

<sup>282</sup> Articles L2222-1 and L2222-2, CGCT.

*personnalité morale* occurs when an entity, distinct from the municipality, is in charge of the service. In this case, the municipality owns the company entirely, but the latter enjoys financial autonomy and a distinct legal personality.<sup>283</sup>

When the service is delegated to a private provider, two of the most common contracts employed are the concession and the *affermage*, or lease contract. A concession is a contract by which the private company builds the appropriate infrastructure, provides the service and assumes the investment risks. In exchange, it charges and receives the service fees directly from the users, to cover expenses and benefits. An *affermage* is usually a shorter contract than the concession. The private company offers a service of water distribution and sanitation. It is therefore not in charge of the infrastructure, its planning or building. The company collect the service fees, and transfer to the local authority the fraction destined to maintenance and works development. It is the contract most commonly employed in France.

Other contract types also exist. In the *régie intéressée* (or intermediary management) and the *gérance*, when the private company provides the service with the conditions and tariffs established by the local authorities, and benefits from the revenues that they make in managing the resources, or by a fixed amount agreed with the municipalities. The *regie* is, according to information provided by the national government, a contract model “in decline”. At end of the 1990s, local authorities were directly responsible of around 20% of all water

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<sup>283</sup> Articles L2221-1 to L2221-9 CGCT

supplied in France, mostly in small rural areas, but also in large cities such as Strasbourg, Nancy, Reims, Amiens, Nantes and Tours<sup>284</sup>.

## 2.2. National government- Ministries

The national government directs all national policies.<sup>285</sup> Concerning water services provision, it is responsible for establishing minimum standards of services with which the local authorities need to comply. Its activities have a fundamental impact on the quality and price of the service that consumers receive at the local level. Indeed, at the national level, the government is in charge of the national water resources planning and for setting environmental standards.

To do so, the national government directs and provides administrative supervision for six national water agencies governing six national River Basins, and it is in charge of water policing to enforce water environmental standards. It also initiates the Directing Plans for Water Management (*Schémas Directeurs d'Aménagement et de Gestion des Eau -SDAGE*), which are the river basin planning documents. They specify the measures taken for the protection and the exploitation of the river basin waters and the infrastructure plans for water resource management. The government also deals with policies for establishing and controlling drinking water standards, and impose conditions on the chemical and physical properties of drinking water for all French local authorities. In addition, the national government carries out activities for

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<sup>284</sup> Direction de l'information légale et administrative, "La Régie," <http://www.vie-publique.fr/documents-vp/regie.shtml>.

<sup>285</sup> Article 20, *Constitution Du 4 Octobre 1958*.



coordinating the activities of local authorities as service providers; it deals with their organisation, responsibilities and resources.

### **2.3. Regions and departments–**

Regions and departments participate in the development of water resources policies in France, particularly by collaborating in the design of the SDAGE. In this sense, Although no legal text gives regions direct responsibilities over water service provision, they have an essential role in overall water management, as they hold responsibilities for the management of a number of areas, including the environment, the transport, and the general development of the region.<sup>286</sup> The activities they carry out affect the quality of the water available in their regions, which ultimately has an impact in the service that water consumers receive. Thus, they have an impact on the quality and the costs of the service that consumers receive.

France is divided into 22 units called regions.<sup>287</sup> Regions are responsible of ensuring that the implementation of the state's water policy is consistent. As such, they are in charge for maintenance and exploitation of rivers, lakes, canalisations, and of informing local authorities on the status of water quality in the region. They also participate in the design and implementation of the SDAGE. To carry their functions, they are administered by a Regional Council (*Conseil Général*), which is an assembly with legislative power whose members elected by universal suffrage amongst candidates of political parties.<sup>288</sup> The Council is headed by a President, who has executive powers and is in charge

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<sup>286</sup> Article L4211-1, CGCT

<sup>287</sup> Regulated in part 3 of the CGTC.

<sup>288</sup> Article L4131-1 CGCT.

of implementing the decisions of the Council.<sup>289</sup> National law establishes the main principles for the organisation and functioning of the Regions, which need to be developed in an internal working code adopted by the Regional Councils.<sup>290</sup>

French regions are subdivided into departments. Currently there are 100 departments, including the 4 overseas departments of French Guiana, Guadeloupe, Martinique and Réunion. The departments have responsibilities in a wide range of areas, including housing, education, social policy, etc.<sup>291</sup>

Regarding water resources and services, departments are responsible for the distribution of aid to rural municipalities for water supply, through the National Funds for Development of Water Supply (*Fonds national pour le développement des adductions d'eau*). These funds are an aid instrument destined to provide financial support for water supply and water treatment works.<sup>292</sup> The departments also participate in the design of the SDAGE. In this sense, French department provide crucial financial support to local authorities for the development of water infrastructure and investment, via subsidies or interest rebates on loans, which have an impact on the water quality and price of the services they receive.<sup>293</sup>

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<sup>289</sup> Article L4131-2 CGCT.

<sup>290</sup> Article L4132-6 CGCT.

<sup>291</sup> See Direction generale des collectivites locales, "Repartition Des Competences," [http://www.dgcl.interieur.gouv.fr/sections/les\\_collectivites\\_te/missions\\_collectivit/tableau\\_de\\_repartiti/downloadFile/file/Tableau\\_des\\_competences.pdf?nocache=1206093452.08](http://www.dgcl.interieur.gouv.fr/sections/les_collectivites_te/missions_collectivit/tableau_de_repartiti/downloadFile/file/Tableau_des_competences.pdf?nocache=1206093452.08).

<sup>292</sup> R2335-9 to R2335-15 CGCT.

<sup>293</sup> International Office for Water, "Public Water Supply and Sanitation Utilities in France," (La Defense Cedex: Ministry of Ecology, Energy, Sustainable Development and the Sea, in charge of green technologies and climate change negotiations), 8.

The representatives of the departments are elected by citizens every six years. They are members of the General Council (*Conseil Général*),<sup>294</sup> which is a legislative body.<sup>295</sup> Each member of the General Council is elected by the citizens of each of the different cantons in which the *communes* are divided – up to around 4,032 cantons.<sup>296</sup> In addition, the Council elects a President by absolute majority.<sup>297</sup> The President holds executive competences in the department, along with a Permanent Commission, composed by one or various vice-presidents and also one or various other members of the Council.<sup>298</sup>

#### 2.4. Catchment area level – Water agencies

The Water Agencies (*Agences de l'eau*) are autonomous public bodies that hold responsibilities for water resource management at the catchment level. France has six agencies, which were created in 1960: Adour-Garonne, Artois-Picardie, Loire-Bretagne, Rhône-Méditerranée-Corse, Rhin-Meuse et Seine-Normandie.<sup>299</sup>

The water agencies are headed by a Director, designated by the Ministry of Environment. The director is in charge of coordinating the actions of the different departments of the State in the field of water. The Agencies also have their own “Parliament” (*Comité de Bassin*) with a strong representation of water

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<sup>294</sup> Article L3121-1 CGCT.

<sup>295</sup> Article L192, *Code Électoral*

<sup>296</sup> More information on Direction générale des collectivités locales, "Le Département - Election Des Conseillers Généraux," [http://www.dgcl.interieur.gouv.fr/sections/les\\_collectivites\\_te/vie\\_democratique\\_loc/le\\_departement/election/le\\_departement\\_-\\_ele/view](http://www.dgcl.interieur.gouv.fr/sections/les_collectivites_te/vie_democratique_loc/le_departement/election/le_departement_-_ele/view).

<sup>297</sup> Article L3122-1 CGCT.

<sup>298</sup> Article L3122-5 CGCT

<sup>299</sup> Section 3, Chapitre III, Titre 1er, Livre II, *Code De L'environnement* .

users and stakeholders: 40% of water users, 40% of local and regional representatives and 20% of national government representatives.<sup>300</sup>

The Water Agencies contribute to the financing of water works and to conserving and developing water resources and their natural surroundings, and the fight against pollution – which affect the service that water consumers receive. The Water Agencies are financed by users, who are levied a tax for volume of water used and also for discharges to the aquatic environment. The scales and the rates of the fees are set in each basin.<sup>301</sup> To the extent that River Basins Authorities have crucial roles for the management and protection of raw water resources, they have a clear impact on the costs and the quality of the water services provided to household consumers.

## **2.5. Private Water companies**

Private water companies hold significant responsibilities in the provision of water services in France. Local authorities, whilst responsible for providing water services, can decide whether to provide the services directly or to contract it out with private providers.<sup>302</sup> Three companies in particular receive the large majority of contracts in France: SUEZ ENVIRONNEMENT<sup>303</sup>, Veolia Environnement<sup>304</sup> and Saur.<sup>305</sup> Together they manage around 73% of total provision of water supply.<sup>306</sup>

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<sup>300</sup>Articles D 213-17, Ibid.

<sup>301</sup>Article L213-10, Ibid.

<sup>302</sup>Article L1411-1, CGCT.

<sup>303</sup> Suez Environnement, <http://www.suez-environnement.fr/>.

<sup>304</sup> See Veolia Environnement, <http://www.veolia.com/fr/>

<sup>305</sup> See Saur, <http://www.saur.com/fr/>.

<sup>306</sup> Marcel Boyer and Serge Garcia, "Organisation Et Reglementation Des Services Publics D'eau Potable Et D'assainissement En France," (Montreal: Centre universitaire de recherche en analyse des organisations, 2002).

In order to delegate any water service, local authorities open a competitive procurement process<sup>307</sup> - thus producing competition “for the market”. The conditions for this procurement process follow the provisions of the Law 29 January 1993, known as “Sapin Law”.<sup>308</sup> By virtue of this act, potential operators are required to bid for the monopoly of the communal service, with the best offer in terms of price and quality of the service wins the right to operate.<sup>309</sup> The local authority then decides on the company that will be in charge of the service, according to the criteria that it considers appropriate. The public authority has a high degree of freedom, and can use both objective and subjective criteria not necessarily specified by law.<sup>310</sup> The costs forecasted, water prices, charges, bills, etc. may be elements that the local authority takes into account, along with quality of service offered. The conditions of the service provided vary according to the terms of the contract established between local authorities and private companies, but property ownership cannot be transferred under any circumstance from the commune to the private operator. The commune is always the assets’ owner.<sup>311</sup>

## 2.6. Consumer associations

Twenty consumer organisations are officially accredited in France to represent consumers. The largest two of these associations (l’Union Fédérale des

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<sup>307</sup> Art L1411-1 CGCT.

<sup>308</sup> *Loi N°93-122 Du 29 Janvier 1993 Relative À La Prévention De La Corruption Et À La Transparence De La Vie Économique Et Des Procédures Publiques*

<sup>309</sup> Paul Seidenstat, "Emerging Competition in Water and Wastewater Industries," [http://www.ucowr.siu.edu/updates/pdf/V117\\_A2.pdf](http://www.ucowr.siu.edu/updates/pdf/V117_A2.pdf).

<sup>310</sup> Eshien Chong et al., "Public-Private Partnerships and Prices: Evidence from Water Distribution in France," *Review of Industrial Organization* 29, no. 1-2 (2006): 10.

<sup>311</sup> M Finger and J Allouche, *Water Privatisation. Transnational Corporations and the Re-Regulation of the Water Industry* (London: SPON Press (Francis & Taylor Group), 2002), 91.

Consommateurs<sup>312</sup> and INDECOSA-CGT Association pour l'Information et la Défense des Consommateurs<sup>313</sup>) are considered by private water operators and the state as representatives of “consumers at large”.<sup>314</sup> These associations act as representatives of consumers’ interests at the national level for variety of topics, including water services provision. In addition, local neighbouring associations and other local groups may be invited ad hoc to participate at the local level in the decision-making for deciding on local infrastructure improvements and pricing.

### 3. LEGAL FRAMEWORK

The legal framework for water services provision includes texts that distribute functions and responsibilities to national institutional bodies, and texts that indicate how these institutions need to carry out their duties.

Regarding the first type, two main laws establish the organisation of functions in France. The *Code général des collectivités territoriales* (CGCT) brings together and structures all laws regarding competences of different territorial authorities – commune, department and region, as well as supra-municipal groupings. The CGCT makes local authorities responsible for water supply and sanitation for local areas under their jurisdiction.<sup>315</sup> Water and sewerage services include the production, treatment, protection, transportation, storage and distribution of water for human consumption, whereas sewerage entails the

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<sup>312</sup> Union fédérale des consommateurs, <http://www.quechoisir.org>.

<sup>313</sup> Indecosa-CGT, <http://www.indecosa.cgt.fr>.

<sup>314</sup> Mike Muller, Robin Simpson, and Meike van Ginneken, "Ways to Improve Water Services by Making Utilities More Accountable to Their Users: A Review," (The International Bank for Reconstruction and Development/The World Bank, 2008).

<sup>315</sup> Article L2224-7-1 and L2224-8 CGCT.

control, collection, transportation, sewage treatment and disposal of sludge.<sup>316</sup> The CGCT establishes that local authorities can delegate all or part of these activities to a public or private party for a remuneration tied to the results of exploitation of the service.<sup>317</sup>

Whilst the communes are the responsible body in charge of providing water services, the *Decret 94-289 du 6 avril 1994 relatif aux communautés locales de l'eau pris pour l'application de l'article 7 de la Loi 92-3 du 3 janvier 1992 sur l'eau* entitles local authorities to create supra-municipal for water resource management and water service provision. This text was further reinforced with the *Loi 99-586 du 12 juillet 1999 relative au renforcement et à la simplification de la coopération intercommunale*, also known as « Loi Chevènement », which aims to facilitate cooperation between local authorities in a variety of service areas. It does so by facilitating that communes regroup to create larger administrative structures in charge of providing local services such as transport, water and sewerage. By doing so, local authorities can pool together their resources and cooperate for the delivery of local services to the citizens within their areas.

During the 1990s, France adopted legislation that defined how public authorities need to carry out their activities as providers of citizen's services. The *Loi 92-125 du février 1992, relative à l'administration territoriale de la République*, establishes the conditions for the functioning of the local governments and the guarantees they need to provide in the exercise of their duties, such conditions to access to information, mechanisms to ensure public local participation and measures to ensure control over local administration

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<sup>316</sup> Article L2224-7 GCCT.

<sup>317</sup> Article L1411-1 CGCT.

affairs. This law was complemented with the *Loi n° 93-122 of 29 janvier 1993 relative à la prévention de la corruption et à la transparence de la vie économique et des procédures publiques*, also known as *Sapin law*, which establishes a strict procedure to foster transparency in public procurement, and to avoid corruption at the local level. The law aims to foster competition in all services provided by the state. Amongst others, it defines that public service delegation can be contracted for a maximum of 20 years, with some exemptions, effectively ending the practice of repeatedly extending the concession, and thus giving no opportunities to competitors to bid for the contract.<sup>318</sup>

In order to further improve transparency and access to information, the national government published text -the *Arrêté du 10 juillet 1996 relatif aux factures de distribution de l'eau et de collecte et de traitement des eaux usées* (modified in March 2008). By virtue of this law, the water bill has been simplified. It currently offers consumers more thorough information about charges applied, as well as details on consumers' service. In similar lines, the *Loi 95-127 du 8 février 1995 relative aux marchés publics et délégations de service public* establishes an obligation for all companies contracted by public authorities to submit an annual report about the activities carried out during the year, and be subject to audit control. The law establishes stricter conditions for all companies working under contract, to ensure that they provide sufficient information about their activities to the contracting partner.

Finally, reference needs to be made to the *Loi 2006-1772 sur l'eau du 30 Décembre 2006*, establishes the conditions for the application of the Water

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<sup>318</sup> Article L1411-2 CGCT.



Framework Directive (transposed into French law by *Loi n°2004-338 du 21 avril 2004 portant transposition de la directive 2000/60/CE du Parlement européen et du Conseil du 23 octobre 2000 établissant un cadre pour une politique communautaire dans le domaine de l'eau*). It also sets up conditions to ensure transparency vis-à-vis users of water resources, to protect vulnerable consumers and to favour environmental efficiency.<sup>319</sup>

All together, these laws constitute the framework that regulates water and sewerage provision in France. Along with these regulations, the contract signed by the local authorities designs the rights and duties of the contracting parts, for the provision of water services. The next section analyses how this body of regulations organise the means and mechanisms to set prices and quality standards in France.

#### 4. PRICE SETTING AND SERVICE QUALITY STANDARD PROCEDURES

Analysing water price setting and service quality standards setting in France requires being aware of the different ways in which local authorities can deliver water services. Depending on who offers the service, whether the local authority directly (or the supra-municipality in cases where a consortium among municipalities exist) or a company operating under delegation, the procedures to set price and service quality standards vary.

All drinking water provided in France is subject to a billing rate.<sup>320</sup> The common structure is the two-part tariff, by which an invariable amount is paid to cover the cost of running and maintaining water infrastructure, and a

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<sup>319</sup> *Loi N°2006-1772 Du 30 Décembre 2006 Sur L'eau Et Les Milieux Aquatiques*.

<sup>320</sup> Article L2224-12-1 CGCT.

variable amount is paid for water consumed – water use in France is mostly metered. The fixed part must not go above a ceiling imposed by the ministry<sup>321</sup> – currently at 40% for urban areas and 50% for rural areas.<sup>322</sup> Apart from the two-part tariff, a simpler fixed price system exists in some smaller municipalities, by which consumers pay a flat and permanent bill regardless of the amount of water consumed. This structure is in principle not allowed, but it is applied exceptionally in small areas with abundant resources.<sup>323</sup>

Besides, the water bill has three main components: a remuneration for the water supply service, a remuneration for the sanitation service, and a part composed by taxes and charges, including the fees paid to Water River Basin (for abstraction, water and waste water treatment, etc). According to the national government, the percentage destined to each of these components is 40% for water supply, 46% for sewerage services and 14% for taxes and other charges<sup>324</sup>.

In all cases, and regardless of who provides the service, the local councils need to ratify the water tariff and the quality of service standards in plenary session. When the municipality offers the service directly, the department in charge of water provision makes the proposal for annual prices and price increases, according to the department objectives' for capital returns. When the service is delegated to private or public concessionaires, the price setting procedure distinguishes between an initial price agreement and its periodic renewals. At

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<sup>321</sup> Article L2224-12-4 CGCT.

<sup>322</sup> International Office for Water, "Public Water Supply and Sanitation Utilities in France," 9.

<sup>323</sup> Ibid.

<sup>324</sup> Ibid., 8.

the beginning of the contract, the municipality and the water operator sign a contract with the initial water bill, which is defined from a business projection and budget elaborated by the water companies. Once the contract has been agreed, any review takes place annually, in order to update it to inflation prices and new conditions that may arise during the concession.

The price update is based on the principle of cost-plus pricing. By this system, the cost of the product is calculated and, subsequently, an additional amount is added to represent profit for the private provider. All French local authorities are required to implement the principle of full cost recovery for all water services provision. This means that all tariffs collected need to be sufficient to cover all the costs of running and maintaining the service to the standards agreed.<sup>325</sup>

Regarding the service quality standards, local authorities need to ensure the provision of water services to environmental and public health standards – of either EU, national, regional or water basin origin.<sup>326</sup> When they provide the service directly, they are responsible for the attainment of such standards. When they contract the services of a third party, they need to ensure that the contract signed with the water operators includes all conditions that guarantee that they meet all requirements. As for all other non-statutory standards, they depend on the contract signed between the local authorities and the concessionaires, when the service is delegated. The service quality standards can be thus defined in bilateral contracts between the local authorities and the

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<sup>325</sup> Article L2224-12-3 CGCT.

<sup>326</sup> For public health standards, see Article L1331-1 to 1331-6 of the *Code De La Santé Publique*.

providers, or unilaterally by the local authorities themselves when they deliver the service directly.

## **5. WATER GOVERNANCE IN FRANCE**

This section analyses the degree of access to information, participation and access to justice guaranteed to French consumers. After analysing the general characteristics of these criteria, each section summarises the analysis by referring to the thirteen criteria developed in chapter 2.

### **5.1. Access to information**

The French regulatory system has introduced provisions to ensure that regulatory documents concerning water price and standards setting are in the public domain so that consumer can access to them. Although the French Constitution does not mention the principle of transparency as a constitutional principle, the right of access to public information has been regulated and guaranteed by law since 1978.<sup>327</sup> This Act establishes the general right and the conditions to access administrative information. It gives all citizens an extensive right to obtain disclosure of documents held by a government both with respect to all public administrations and with private bodies that carry out a delegated service. The obligation to providing public information can be restricted. In particular, legal provisions protect confidentiality when disclosure would undermine the protection of privacy, confidentiality and secrecy of commercial and industrial information.<sup>328</sup>

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<sup>327</sup> *Loi N°78-753 Du 17 Juillet 1978 Portant Diverses Mesures D'amélioration Des Relations Entre L'administration Et Le Public Et Diverses Dispositions D'ordre Administratif, Social Et Fiscal.*

<sup>328</sup> Article 6, *Ibid.*

Apart from the general obligation to disclose information upon request, provisions exist to ensure that public authorities – or private bodies fulfilling public services functions – are active in generating and issuing relevant information concerning water services provision. The law distinguishes between information made available for the local authorities and destined to the public.

As for the first type, the law sets that the Mayor of the council or the President of the inter-municipal structure must submit annually to the commune a report on the accounts of all operations and an analysis on the quality of service. This obligation applies both to delegated and directly provided services. Such report should be examined at the meetings of the decision-making organ of the commune.<sup>329</sup> These documents are public, and need to be made available to the public at the Mayor's place, within 15 days of their reception.<sup>330</sup> The commune's Mayor affixes a notice of reception at the Mayor's place and habitual places of notice for at least one month.<sup>331</sup> In addition, if the service is delegated, the water operator must publish an annual report giving information on how the contract has been met, including information on the service provided, infrastructure put into place and company accounts.<sup>332</sup> From 2007, the national government has established which performance indicators public and private operators need to inform about, such as quality of service to the user, financial management and assets and environmental performance.<sup>333</sup>

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<sup>329</sup> Article L1411-3 CGCT.

<sup>330</sup> This is a requirement only in communes of 3,500 inhabitants or more.

<sup>331</sup> Article L1411-13 CGCT.

<sup>332</sup> Article L1414-14 CGCT

<sup>333</sup> See *Arrêté Du 2 Mai 2007 Relatif Aux Rapports Annuels Sur Le Prix Et La Qualité Des Services Publics D'eau Potable Et D'assainissement*.

Regarding information to water consumers, the law establishes that all residents have the right to be informed on water provision and water quality issues. This right is exerted independently of any other provisions on dissemination of the activities of territorial authorities and freedom of access to administrative documents.<sup>334</sup> In this context, since July 2000, the water bill has been made simpler for consumers and more comprehensive.<sup>335</sup> Water operators are required to break the bill into its constituent parts, so that consumers can have a more clear understanding of the charges applied, the volume of water consumed, the monies that are transferred to the local authority and those that the water company keeps.

Concerning information on customer standards, the municipality needs to adopt service regulations (*un règlement de service*) establishing the conditions of the service, as well as the duties that all water stakeholders (private company, water users, local authorities) need to comply with.<sup>336</sup> These regulations must be sent to all water users, by post or email, and its receipt has to be acknowledged. The operator has to report to the Mayor or to President of the supramunicipal entity about all measures carried out to ensure the effective dissemination of service regulation.<sup>337</sup> The service regulations need to be available to users at all times.

Access to information is usually free, with only certain costs of reproduction being transferred to consumers. Access to administrative documents is carried

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<sup>334</sup> Article L2141-1 CGCT.

<sup>335</sup> *Arrêté Du 10 Juillet 1996 Relatif Aux Factures De Distribution De L'eau Et De Collecte Et De Traitement Des Eaux Usées*

<sup>336</sup> Article L2224-12 CGCT.

<sup>337</sup> Article L2224-12 CGCT.

out via consultation on site (unless the preservation of the document does not allow it), without a charge, via reproduction of the document (provided that the reproduction does not interfere with the retention of the document) and/or by e-mail and without charge when the document is available electronically.<sup>338</sup> A growing number of communes and private water providers give the information online, reducing significantly the costs of consultation and reproduction.

In cases when problems with access to information exist, consumers have the right to appeal to the **Committee on Access to Administrative Documents**. (*Commission d'Accès aux Documents Administratifs* - CADA). The CADA is an independent administrative authority, responsible for ensuring freedom of access to administrative documents and public records. It consists of eleven members<sup>339</sup> appointed by decree of the Prime Minister for a period of three years, renewable.

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<sup>338</sup> Article 4, *Loi N°78-753 Du 17 Juillet 1978 Portant Diverses Mesures D'amélioration Des Relations Entre L'administration Et Le Public Et Diverses Dispositions D'ordre Administratif, Social Et Fiscal*.

<sup>339</sup> Article 20, *Ibid*. The article establishes that "a member of the State Council, a grade at least equal to that of advisor, chair, a judge of the Court of Cassation and a judge of the Court of Auditors in active or honorary, appointed by the Vice - President of the State Council, the first President of the Court of Cassation and the first President of the Court of Auditors;

b) A deputy and a senator appointed by the President of the National Assembly and the Senate President;

c) An elected official of a local authority appointed by the President of the Senate;

d) A professor of higher education, active or honorary, proposed by the Chairman of the Committee;

e) A person qualified in archives, proposed by the Director of the Archives of France;

f) A person qualified in the protection of personal data, proposed by the President of the National Commission on Informatics and Freedoms;

g) A person with knowledge of competition and pricing, proposed by the President of the Competition Authority;

h) A person qualified in disseminating public information.

A substitute is appointed under the same conditions for each member".

The CADA issues its opinion when called upon by a person who is unsatisfied with an administrative refusal to disclose public information. A public office can express refusal in two different ways: by informing, in writing, that it will not provide the requested document or tacitly, by silence for over a month.<sup>340</sup> In either case, citizens have the right to refer the decision to the CADA in the following two months.<sup>341</sup>

From the date of registration of application to review an administrative decision, CADA has one month to declare whether the claim is admissible and grounded.<sup>342</sup> If after analysing the case the CADA considers claimant is right, it will issue an opinion favourable to the release the document at issue. The opinion is addressed to the public authority with the duty to disclose the information. The opinions of the CADA are not binding, so the administration is not obliged to comply with an advice to release information, and the CADA has no means to act against this decision. For this reason, if despite a positive opinion from the CADA, the requested information is not released, the claimant can appeal before the administrative court for excess of power after a period of two months from making the request for information to the CADA.

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<sup>340</sup> Art 17, Décret N° 2005-1755 Du 30 Décembre 2005 Relatif À La Liberté D'accès Aux Documents Administratifs Et À La Réutilisation Des Informations Publiques, Pris Pour L'application De La Loi N° 78-753 Du 17 Juillet 1978

<sup>341</sup> Chapitre III, Titre Ier, Loi N°78-753 Du 17 Juillet 1978 Portant Diverses Mesures D'amélioration Des Relations Entre L'administration Et Le Public Et Diverses Dispositions D'ordre Administratif, Social Et Fiscal.

<sup>342</sup> Article 19, Décret N° 2005-1755 Du 30 Décembre 2005 Relatif À La Liberté D'accès Aux Documents Administratifs Et À La Réutilisation Des Informations Publiques, Pris Pour L'application De La Loi N° 78-753 Du 17 Juillet 1978



Alternatively, the CADA may render an adverse opinion because of the contents of the document or its incompleteness or preparatory nature. It may also manifest its incompetence to deal with the case because the requested document is outside its jurisdiction. For these cases, the claimant has the option to challenge this decision before an Administrative Judge or Court, which will deal with the issue via judicial means.

Despite the existence of these mechanisms to access information, water stakeholders interviewed have identified certain deficits in the information provided. Understanding how water services provision operates in France, the rights and obligations of local authorities and water companies requires a significant knowledge of administrative law and regulation.<sup>343</sup> In particular, consumers do not have a clear sense of who is responsible for the provision of the service, as frequently it is a new supra-municipal collectivity, and not the commune, that provide the service.<sup>344</sup> Who is represented in these new institutions, their powers and, at times, even their existence is not clear to consumers.

Stakeholders have indicated that the clarity of the water bill varies dramatically across French municipalities.<sup>345</sup> In particular, clear data on water consumption has been indicated as missing. This situation is aggravated by the fact that almost half of consumers in France do not receive direct bills. In a large number of cases, the bill refers to consumption made by all tenants of a

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<sup>343</sup> Interview 2; Interview 4.

<sup>344</sup> Interview 2.

<sup>345</sup> Interview 2; Interview 3.

building, which is subsequently divided by tenants.<sup>346</sup> The relevance of the information provided is also questioned. The information that the communes made available is mostly technical. No benchmarking across municipalities exists, and no counter-report on the information provided is elaborated either. This situation entails that consumers have little reference point to compare the performance of their water providers.<sup>347</sup> Even when the information provided is clear and easily available (for instance, online) interviewed stakeholders pointed to the no information is given on relevant information such as break-ups on the costs of running the service, costs of treatment of domestic and agriculture waste waters, differential water tariff between users (domestic and farming, in particular) and costs of private vs public provision.<sup>348</sup> For some, however, improvements in water information access may not be cost-efficient for water companies, as there little public interest in water issues from a service-provision perspective.<sup>349</sup>

## **5.2. Public Participation**

Consumer participation in France is ensured both indirectly by political representatives at the local level, and by means of direct consumer engagement in the decision making process.<sup>350</sup> In the first case, users participate through the election of local representatives, who are responsible for water service provision policies. In the second case, which is the focus of this section, water consumers can contribute directly to the development of a local water policy.

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<sup>346</sup> Interview 1; Interview 4.

<sup>347</sup> Interview 1; Interview 2; Interview 3.

<sup>348</sup> Interview 3.

<sup>349</sup> Interview 4.

<sup>350</sup> Andres, Guasch, and Azumendi, "Regulatory Governance and Sector Performance: Methodology and Evaluation for Electricity Distribution in Latin America."

The last decade has witnessed a policy shift to introduce further opportunities for water consumers to take part in the water price and water standards setting procedures.<sup>351</sup> In particular, since 2003, consumers can participate in the **Consultative Committees for Public Services** (*Commissions Consultatives des Services Publics Locaux*).<sup>352</sup> These Consultative committees operate exclusively in communes with more than 10,000 inhabitants and in inter-communal groups with more than 50,000 inhabitants.<sup>353</sup> The Committees have a President - either the Mayor of the Council or the Chair of the intercommunal union - members of the Council, and the representatives of local associations.<sup>354</sup>

The Committees' main aim is to allow water users to get access to information about the functioning of public services and to examine the annual report produced about the price and quality of water and sanitation services, along with other business reports.<sup>355</sup> The local council is also required to consult the Committee before any delegation of public service and every project of creating or delegation public services<sup>356</sup> and when a proposed amendment to a convention of public service increases costs over 5%.<sup>357</sup> Apart from these, the Committees may be consulted on any issue or project affecting public services and local facilities. They can also transmit to the mayor any proposal concerning any issue of communal interest for which they were established.<sup>358</sup>

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<sup>351</sup> Ibid.

<sup>352</sup> By means of the *Loi N°2002-276 Du 27 Février 2002 Relative À La Démocratie De Proximité* (codified in the CGCT)

<sup>353</sup> Article L1413-1 CGCT

<sup>354</sup> Article L1413-1 CGCT

<sup>355</sup> Article L.1411-4 CGCT.

<sup>356</sup> Article L.1411-3 du CGCT.

<sup>357</sup> Article L1411-6 CGCT.

<sup>358</sup> Article L2143-2 CGCT.

The Committees self-regulate their activity by means of an internal charter.<sup>359</sup> This charter defines the periodicity of meetings, the agenda, the rules for convening meetings, the quorum conditions, the conditions that apply to give publicity to their debates, their mechanisms for accountability, etc. The national law has however established certain conditions for the functioning of the Committees. For instance, the national law requires the Committee to distribute all relevant documents at least 15 days in advance before the date when the committee needs to announce its deliberation.<sup>360</sup> In addition, two months after taking the decision to delegate a service to a private operator, the Committee needs to publish its opinion on the choice of agent and the delegation contract.

In all cases, the resolution of the Committee is exclusively advisory. Concerning water provision, the Committee has a say only in its preferred type of service provision (public or delegated) but does not issue opinion on the characteristics of the contract signed by the local authority and the water provider. The local authority may decide to operate against the advice and the preferences of the Committee.

Despite these increasing opportunities to participate, water consumers have stressed the difficulties of having consumer representatives in all Committees.<sup>361</sup> Consumers' representatives work on voluntary basis and need to cover a wide ranging number of topics to exercise their competences. Asymmetries of knowledge and resources between consumers, private

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<sup>359</sup> Article L1413-1

<sup>360</sup> Article

<sup>361</sup> Interview1.

providers and public authorities have been highlighted as one of the main practical limitations for public participation in practice. This makes necessary, according to interviewed stakeholders, to raise awareness on water policy amongst consumers.<sup>362</sup>

### 5.3. Access to justice

Consumers dissatisfied with the service provided by local authorities in France (either directly or via concession) have different mechanisms to ask for a review of the decisions taken. The existing internal and external measures, as well as administrative and judicial means are discussed here.

If consumers are dissatisfied with the service provided by a concessionary responsible via an administrative contract, they may complain first to the water provider for failure to perform to the standards of service contracted. For these cases, the water operator may define different procedures to raise a complaint, about which they need to inform the consumers. The company Lyonnaise des Eaux, for instance, provides customer services to deal with problems derived from a deficient service. By means of these services, consumers may raise their concerns, and find an agreement directly with the water provider. If the consumer is still dissatisfied, the customer may then refer the case to the Direction of the company, which will investigate it.<sup>363</sup>

In addition, in October 2009, the Professional Federation of Water Companies, (*Fédération Professionnelle des Entreprises de l'Eau*- FP2E), the Association of

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<sup>362</sup> Interviewee 3.

<sup>363</sup> See Lyonnaise des Eaux, "Déposer Une Demande Ou Une Réclamation," <http://www.lyonnaise-des-eaux.fr/particuliers/vous-voulez/deposer-reclamation>.

Local Authorities of France (*Association des Maires de France* - AMF) and the Assembly of Communities of France (*Assemblée des Communautés de France*) created the office of the Water Ombudsman (*Mediation de l'Eau*) and elected the person heading this position. Customers of private water companies can ask for the intervention of the *Mediateur de l'Eau* if they are dissatisfied with the internal response given to their complaints, by sending a letter describing the case. If the *Mediateur* accepts the case, s/he will have up to three months, renewable, to investigate it and propose a solution to the issue, which needs to be accepted in written by the parts in conflict. These services are free for consumers.<sup>364</sup>

If they continue to be dissatisfied with the service given by the water company, consumers have access to ordinary courts, which need to settle the dispute. The procedure to bring an action to court is contained in the *Code de procédure civile*. Judgements deriving from these procedures are enforceable and must be served on the party against whom the judgement has been made. Parties have the right to appeal to one of the 30 **Regional Court of Appeals** (*Cour d'appel*) in France. Appeals to the the desions of these regional courts are to be raised to the Cour de cassation, where the proceedings end.

Different procedures are initiated when consumers disagree with a decision by the local authorities regarding either their decisions as direct services providers or as regulators of the activities of water companies. First,, they can

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<sup>364</sup> For more information on the Mediation de l'Eau, see Médiation de l'Eau, "La Mediation," <http://www.mediation-eau.fr/index.html>.

initiate internal administrative appeals to try to correct their decision.<sup>365</sup> These appeals are generally exercised prior to the litigation, and are divided into two types:

- *Recours gracieux* (or appeals) addressed to the administrative authority which took the decision.
- *Recours hiérarchique* (hierarchical appeals), addressed to a higher authority than that which took the decision.

In both cases, the appeal must be submitted in writing, accompanied by all necessary supporting documents, within two months after the decision is reached. The administration has two months to answer, reconfirming or modifying the decision. If it does not respond within this period, its silence is an implied rejection of the appeal.<sup>366</sup>

If consumers continue to be dissatisfied, they can call for the intervention of the *Médiateur de la République* (French Republic Ombudsman) created in 1973.<sup>367</sup> The *Médiateur* is an independent authority appointed by the national Council of Ministers,<sup>368</sup> which deals with complaints raised against the national and other territorial administrations, public bodies and any other organisation carrying out a public service.<sup>369</sup> To raise a complaint for the *Médiateur*, citizens need to address first a member of parliament or a senator, who need to transmit it to the *Médiateur* if they consider it merits the *Médiateur's* attention.<sup>370</sup>

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<sup>365</sup> See articles R421-1, R421-2 and R421-5, *Code De Justice Administrative - Version Consolidée Au 10 Décembre 2009*.

<sup>366</sup> Direction de l'information légale et administrative, "Fonction Publique : Recours Gracieux Et Hiérarchique," <http://vosdroits.service-public.fr/F509.xhtml>.

<sup>367</sup> *Loi N° 73-6 Du 3 Janvier 1973 Instituant Un Médiateur De La République (Version Consolidée Au 29 Décembre 2008)*.

<sup>368</sup> Article 2, *Ibid.*

<sup>369</sup> Article 1, *Ibid.*

<sup>370</sup> Article 6, *Ibid.*

If S/He considers to take the matter forward, the *Mediateur* has the power to demand and collect information on the dispute, and all public authorities have the duty to facilitate the necessary information.<sup>371</sup> At the end of the investigation, the *Mediateur* can issue recommendations to bring a solution to the dispute, and may suggest legislative modifications to give a long-term response to contentious issues.<sup>372</sup>

Finally, if consumers continue to dispute the solutions proposed either internally or by the *Mediateur*, they can appeal to an Administrative Court. In France, 37 Administrative Courts deal with cases opened against government administrations in first instance. The appeal to their judgements can be exercised before 8 Administrative Courts of Appeal. At the peak of the administrative judicial pyramid, there is the *Conseil d'État* (Council of State). This works as a final appeal court for cases referred from all other administrative courts. The action will be taken directly to the State Council if the refusal stems from an administrative body with national jurisdiction.

The laws applicable for administrative judicial review are contained in the *Code De Justice Administrative* (Code for administrative Justice)<sup>373</sup>. This code establishes that any physical person is entitled to refer to the administrative judge the decisions taken by local authorities with regards to both unilateral actions from the local authority, or a contract with a third party<sup>374</sup>. Administrative courts hold responsibilities to deal with actions directed

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<sup>371</sup> Article 12, Ibid.

<sup>372</sup> Article 9, Ibid.

<sup>373</sup> The rules of the litigious administrative proceeding are regulated in *Code De Justice Administrative - Version Consolidée Au 10 Décembre 2009*.

<sup>374</sup> Provided that they comply with rules of civil law for capacity.



against administrative acts and with all demands of compensation for damages caused by the administration's activities.

Litigation coming before the administrative courts can be divided into two categories: appeals of full jurisdiction and ultra vires litigation (*contentieux de l'excès de pouvoir*).<sup>375</sup> In full jurisdiction, judges can pronounce sentences that substitute the administrative decision with their judicial decision. The domain of full litigation is wide, and can be exercised in very different domains. The complaint tries to determine a person's rights or entitlement vis-à-vis the administration. The sentence may not only quash an administrative decision, but also may involve reforming an administrative act and award damages<sup>376</sup>. In ultra vires litigation, the complainant only seeks the annulment of some administrative act or decision on the ground of its illegality. For these cases, administrative courts have the power to declare an act void. This occurs, for instance, in appeals against decision refusing information disclosure.

The appeal before the administrative court is not subject to any particular formalism, and it is not mandatory to hire a lawyer. The judge has significant powers of investigation. It may "require the competent authorities to produce all necessary documents, including documents that the denial of access is the subject of the dispute" (EC, December 23, 1988, *Banque de France v. H.*).

As for decisions, the main guideline of all the administrative tribunals and courts of appeal is the case-law issued by the Council of State. Although the

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<sup>375</sup> Article L521-1, *Code De Justice Administrative - Version Consolidée Au 10 Décembre 2009*.

<sup>376</sup> Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, "Administrative Justice in Europe - Report for France," (2009), [http://www.juradmin.eu/en/eurtour/eurtour\\_en.lasso?page=detail&countryid=10](http://www.juradmin.eu/en/eurtour/eurtour_en.lasso?page=detail&countryid=10).

Council's precedents are not, in theory, legally binding, administrative jurisdictions practically always implement it very strictly, since their judgements could otherwise be successfully challenged.

In all cases, legal aid can be granted to individuals with insufficient means. The legal assistance offices at each district court and at the Council of State can estimate, once a request appears serious, whether to offer total or partial assistance. The beneficiaries need to justify having limited financial resources.<sup>377</sup>

Interviewed stakeholders agree on considering that mechanisms to access to justice do exist<sup>378</sup> Reasons for contestation have been various: perceived insufficiency of information on water bills, and increases in tariffs caused by leakages are the two most referred cases to court.<sup>379</sup> In practice, they stress that the cases brought to administrative courts for water service provision are small in number and far apart. Interviewed experts argued that water services provision in France is perceived as relatively uncontroversial: the water provided is generally safe and cheap for consumers.<sup>380</sup> However, consumers also pointed that judicial procedures are long and costly. Unless strongly militant, consumers are not likely to refer to court cases of deficient or poor service, as the costs of initiating the procedure outweigh the benefits derived from a possible restoration.<sup>381</sup> National experts pointed in interview that more information on the functioning of the water sector could facilitate a better

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<sup>377</sup> Loi n°91-647 du 10 juillet 1991 relative à l'aide juridique. See also Ibid.

<sup>378</sup> Interview 3, interview 4.

<sup>379</sup> Interview 2, interview 3, interview 4.

<sup>380</sup> Interviewee 4.

<sup>381</sup> Interviewee 1.

access to justice, as consumers would be more aware of their rights and the scope for improvements. Providing legal assistance to consumers on the chances for their appeal to succeed would also improve the actual access to justice that French consumers currently hold.

## **6. CONCLUSION**

France has developed a paradigmatic model for water services provision based on public ownership of water assets and widespread delegation of water services to third private parties. Local authorities are the responsible bodies for providing water and sewerage services, and responsible for the adoption of environmental and water quality standards established at the national, regional and water basin level.

Traditionally the regulatory framework relied on ensuring mechanisms for regulation and control of the activities of the water providers by the responsible bodies (communes and supramunicipal associations). The regulatory framework for water services governance has changed in the last 15 years to allow a higher involvement of consumers in the decision making process to set water prices and quality standards. Although water users are considered mainly recipients of a service, and not participants in the decision-making process, they have achieved greater access to information, public participation and access to justice.

CHAPTER 6. ITALY<sup>382</sup>

## 1. INTRODUCTION

Italy is a water-rich country. With an average total of water resources of 191,300 km<sup>3</sup> a year, Italy has a large amount of both superficial and groundwater resources for its around 58 million people. The geographical character of Italy is uneven, with the northern parts of the country having access to a larger amount of water than the drier southern areas. Here, stark problems of water access have been profuse, with certain areas lacking sufficient drinking water for part of the year, particularly in the hottest months. Despite the difficulties, water consumption in Italy is around 250 litres per person per day, one of the highest of the countries considered in this report.

Demographic data	
Total population	58 million
Urban population (%)	67%
Number of households	23.3 million <sup>383</sup>

Natural resources data	
Water availability per person per year	3,325 m <sup>3</sup> <sup>384</sup>
Average water use per person per day	250 litres/person/day <sup>385</sup>
Average water bill	€297 <sup>386</sup>

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<sup>382</sup> This chapter has been written with the research assistance of Teresa Luguori LLM (Water Governance and Conflict Resolution) UNESCO Centre for Water Law, Policy and Science, University of Dundee. Pietro Baldovin's assistance is also greatly appreciated.

<sup>383</sup> Italian National Statistical Institute, "Italy in Figures," (Roma: Italian National Statistical Institute, 2005).

<sup>384</sup> Food and Agriculture Organization of the United Nations, "Aquastat."

<sup>385</sup> Istituto Nazionale di Statistica, "Censimento Delle Risorse Idriche a Uso Civile - Anno 2008,"

[http://www.istat.it/salastampa/comunicati/non\\_calendario/20091210\\_00/testointegrale20091210.pdf](http://www.istat.it/salastampa/comunicati/non_calendario/20091210_00/testointegrale20091210.pdf).

Allocation of roles between public authorities	
Responsible body for drinking and waste water provision	Optimal Territorial Areas (ATO), supramunicipal authorities
Other relevant authorities	Ministry of the Environment for laws and regulations
	Optimal Territorial Areas, for water resources management

Management models for water utilities	
Types of operators active in the country	Publicly owned entities
	Private operators under PPP contracts
Infrastructure ownership	Public authorities
Forms of public-private partnership	Concession
	Public-private joint ventures

## 2. INSTITUTIONAL FRAMEWORK

Italy is a parliamentary democratic republic. Two houses, the *Camera dei Deputati* and the *Senato della Repubblica*, represent the people of Italy.<sup>387</sup> A President, the head of the state, is elected by Parliament in joint session and a group three regional representatives per region.<sup>388</sup> The executive power is exercised by the Prime Minister, nominated by the President, and the Council of Ministers, appointed by the President of the Republic on the advice of the Prime Minister.<sup>389</sup>

The Italian state is divided into twenty regions, 109 provinces, and around 8,100 comuni (municipalities or local authorities). Traditionally, water services provision has been a responsibility of the local authorities, which have been in charge of planning the required infrastructure and carrying out the daily activities to supply drinking water and sewerage services to their local residents.

<sup>386</sup> Comitato per la Vigilanza sull'Uso delle Risorse Idriche, "Rapporto Sullo Stato Dei Servizi Idrici," [http://www.conviri.it/contenuti/Relazioni\\_annuali/Rapporto\\_2009.pdf](http://www.conviri.it/contenuti/Relazioni_annuali/Rapporto_2009.pdf).

<sup>387</sup> Article 60, *Constitution of the Italian Republic*.

<sup>388</sup> Article 83, *Ibid*.

<sup>389</sup> Article 92, *Ibid*.

During the 1990s, this institutional framework has changed. The current distribution of responsibilities is outlined below, by following the provisions of Italian Constitution and the main texts on water resources and services management in force, particularly the *Decreto legislativo 3 aprile 2006, n 152, "Norme in materia ambientale"* which deals with the protection of the environment.<sup>390</sup>

**2.1.** The **national government** holds responsibilities for the provision of water services and the management of water resources. Its principal functions are established in the Italian Constitution enunciates and include, amongst others, the protection of the environment and the ecosystem. The national government has exclusive powers to legislate on this matter. All other national actors are subject to its standards and requirements. Subsequent legislation – see further below in section 3 - has defined the responsibilities of the national government for the management of water services and resources, such as developing national plans to control the national water resources, ensuring security and safety of drinking water for the country and monitoring the country's water quality and quantity. In this sense, the national government provides the framework legislation needed to ensure environmental and public health standards for all water resources in the country.

The Ministry in charge of water resource regulation is the Ministry of the Environment and protection of land and sea. Since 2009, the national government appoints the members of a national committee constituted to coordinate and share information on the activities of the different national

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<sup>390</sup> *Decreto Legislativo 3 Aprile 2006, N 152, Norme in Materia Ambientale.*

actors. This is the **Commission National Supervision of Water Resources** (Co.N.Vi.RI. - *Commissione Nazionale di Vigilanza sulle Risorse Idriche*).<sup>391</sup> Among the fundamental tasks entrusted to the Co.N.Vi.RI. is to ensure compliance with certain principles for water services provision, with particular reference to efficiency, effectiveness and economy of service, regular determination and regular adjustment of tariffs, and the protection of users' interests. The Co.N.Vi.RI. can establish indicators and benchmarks for assessing the quality of services and protect the interests of users.<sup>392</sup> It is also empowered to bring action before the competent courts against acts violating the existing legislation on integrated water service, and to pursue actions against public authorities for damages to water resources.<sup>393</sup>

The Co.N.Vi.RI. substituted the Supervising Authority on Water Resources and Waste (*Autorità di vigilanza sulle risorse idriche e sui rifiuti*), created in 2006,<sup>394</sup> which itself took over the Supervising Committee on the use of Water Resources (Co.Vi.RI.- *Comitato per la vigilanza sull'uso delle risorse idriche*) created in 1994 for the monitoring of the national water resources.<sup>395</sup> The current Co.N.Vi.RI. is made up of five members, holding office for three years. Two of these members are proposed by the Conference of Presidents of the Regions and the Autonomous Provinces. The other three, including the president, are chosen for their legal

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<sup>391</sup>Article 9bis.6 point a-1 Legge 24/06/2009 , N. 77 Conversione in Legge, Con Modificazioni, Del Decreto-Legge 28 Aprile 2009, N. 39, Recante Interventi Urgenti in Favore Delle Popolazioni Colpite Dagli Eventi Sismici Nella Regione Abruzzo Nel Mese Di Aprile 2009 E Ulteriori Interventi Urgenti Di Protezione Civile .

<sup>392</sup> Article 161, Decreto Legislative 3 Aprile 2006, N 152, Norme in Materia Ambientale.

<sup>393</sup> Article 161, Ibid.

<sup>394</sup> Article 159 Ibid.Law 152/2006

<sup>395</sup> Created by Article 21, Capo III, Legge 5 Gennaio 1994, N 36, Disposizioni in Materia Di Risorse Idriche.

and administrative or technical-scientific expertise and knowledge, from either the public or the private sector.

**2.2. Italy is divided into twenty regions:** Piemonte; Valle d'Aosta; Lombardia; Trentino-Alto Adige; Veneto; Friuli-Venezia Giulia; Liguria; Emilia-Romagna; Toscana; Umbria; Marche; Lazio; Abruzzo; Molise; Campania; Puglia; Basilicata; Calabria; Sicilia and Sardegna.<sup>396</sup> These regions have responsibilities in policy areas that have an impact on water services provision, such as territorial planning and the enhancement of cultural and environmental protection.<sup>397</sup> The Constitution indicates that Italian regions and the national government share legislative power: the regions can regulate in these areas, except for the determination of the fundamental principles, which are laid down in State legislation.<sup>398</sup> Thus, Italy is best considered a country with a unitary legal system of regional autonomies.<sup>399</sup>

Subsequent legislation has further defined the functions of the regions. Regarding water services and water management, regions organise water use and water quality plans in their jurisdictions. Thus, they cooperate in the development of plans for river basins, formulate proposals for the preparation of studies and projects relating to river basin districts; and take any other action deemed necessary for the conservation and protection of land, soil and

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<sup>396</sup> Article 131, *Constitution of the Italian Republic*. Five of these regions enjoy particular forms and conditions of autonomy: Friuli-Venezia Giulia, Sardegna, Sicilia, Trentino-Alto Adige, and the Valle d'Aosta (Article 116, *Constitution of the Italian Republic*.)

<sup>397</sup> Article 117, *Constitution of the Italian Republic*.

<sup>398</sup> *Ibid.*

<sup>399</sup> Nicola Lugaresi, "The Situation in Italy" (paper presented at the International Conference on water management in federal and federal type countries, Zaragoza, 2008), no page.



subsoil and the protection and use of water in the catchment areas within their jurisdictions.<sup>400</sup> In this sense, they are entrusted with the custody and control of water resources. In addition, the regions can regulate the forms and ways of cooperation between local optimum falling within the ATOs<sup>401</sup> – see further below in section 2.5 on the ATOs.

The decision-making bodies of the Region are the Regional Council, the Regional Executive and its President.<sup>402</sup> The Regional Council is the regional parliament, which exercises legislative powers, as well as the other functions conferred by the Constitution and other laws. The Regional Council is elected every 5 years.<sup>403</sup> Four-fifth of Council seats are allocated through a proportional system on the basis of competing provincial lists of candidates; one-fifth is assigned through a majority system on the basis of competing provincial lists of candidates.<sup>404</sup> The Regional Executive is led by a President, which represents the Region, directs the policymaking of the Executive, promulgates laws and regional statutes, and directs the administrative functions delegated to the Region by the State, in conformity with the instructions of the Government of the Republic.<sup>405</sup>

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<sup>400</sup> Article 61, *Decreto Legislativo 3 Aprile 2006, N 152, Norme in Materia Ambientale*.

<sup>401</sup> Article 148.2, *Ibid.*

<sup>402</sup> Article 121, *Constitution of the Italian Republic*.

<sup>403</sup> Article 3, *Legge 17 Febbraio 1968, N. 108, Norme Per La Elezione Dei Consigli Regionali Delle Regioni a Statuto Normale*.

<sup>404</sup> Article 1.2 *Legge 23 Febbraio 1995, N. 43 - Nuove Norme Per La Elezione Dei Consigli Delle Regioni a Statuto Ordinario*.

<sup>405</sup> Article 121.4, *Constitution of the Italian Republic*.

**2.3.** As well as in regions, **Italy is divided into around 8100 local authorities.**<sup>406</sup> According to the Constitution, municipalities hold administrative functions and other responsibilities attributed by the State and the regions.<sup>407</sup> The constitution protects and promotes local autonomy and the application of the principle of decentralisation of state services.<sup>408</sup>

Subsequent legislation has defined the responsibilities of local authorities. In 2000, the *Testo Unico Delle Leggi Sul'ordinamento Degli Enti Locali* brought together previous norms that regulated the competences and procedures of local authorities. This text obliges local authorities to provide urban local services,<sup>409</sup> and defines the means and procedures to do so – including modes of management, financing, control and monitoring.<sup>410</sup> Local authorities are also obliged to comply with the quality standards, the customers' protection, the criteria to measure the quality of the service, etc. established at the national level in directives issued and updated annually by the Prime Minister.<sup>411</sup>

Local authorities are in charge of choosing how to manage assets for water services planning and for water services, and for determining users' charges and fees and enforcing contracts with water service operators.<sup>412</sup> They are

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<sup>406</sup> Between the Regions and the Local authorities, Provinces are another administrative division. They are not considered in this chapter, as they do not carry out functions as in water management or water services.

<sup>407</sup> Article 118.2, *Constitution of the Italian Republic*.

<sup>408</sup> Article 5, *Ibid*.

<sup>409</sup> Article 112, "Code of Practice on Written Consultation."

<sup>410</sup> *Ibid*.

<sup>411</sup> Chapter III, *Decreto Legislativo 30 Luglio 1999, N. 286 "Riordino E Potenziamento Dei Meccanismi E Strumenti Di Monitoraggio E Valutazione Dei Costi, Dei Rendimenti E Dei Risultati Dell'attività Svolta Dalle Amministrazioni Pubbliche, a Norma Dell'articolo 11 Della Legge 15 Marzo 1997, N. 59"*.

<sup>412</sup> Article 142, *Decreto Legislative 3 Aprile 2006, N 152, Norme in Materia Ambientale*.

entitled to create public limited companies in order to perform public services or build infrastructure that will be used to deliver public services,<sup>413</sup> and do so coordination with other local authorities belonging to the same Optimal Territorial Area (ATO) – see below in section 2.5. The regions and autonomous provinces regulate the forms and ways of cooperation between local authorities falling within the same ATO.<sup>414</sup>

Along with these three “traditional” administrative and political authorities, two other territorial bodies hold responsibilities in water services and water resources management: the **River Basin Districts** and the **Optimal Territorial Areas** (*ATOs-Ambiti Territoriali Ottimali* ).

**2.4. River Basin Districts.** Italy’s territory is divided into eight River districts: Alpi Orientali, Padano, Serchio, Appennino Centrale, Appennino Meridionale, Sardegna and Sicilia.<sup>415</sup> The River Basin Districts are territorial divisions destined to the management of all the Italian river basins.<sup>416</sup> Each of these River districts is headed by an Authority, the *Conferenza istituzionale permanente*, composed by political representatives of each of the regional governments of the River Basin District, and chaired by the Minister for the Environment and Territory.<sup>417</sup>

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<sup>413</sup> Article 116, *Decreto Legislativo 18 Agosto 2000, N 267, Testo Unico Delle Leggi Sul’ordinamento Degli Enti Locali*.

<sup>414</sup> Article 148.2, *Decreto Legislative 3 Aprile 2006, N 152, Norme in Materia Ambientale*.

<sup>415</sup> Article 64, *Ibid*.

<sup>416</sup> The concept of River Basin was introduced by *Legge 8 May 1989, N.183 ‘Norme Per Il Riassetto Organizzativo E Funzionale Della Difesa Del Suolo’*. This text was abolished by *Decreto Legislative 3 Aprile 2006, N 152, Norme in Materia Ambientale*. The Decreto introduced the concept of River Basin District to comply with the Water Framework Directive.

<sup>417</sup> Article 63, *Decreto Legislative 3 Aprile 2006, N 152, Norme in Materia Ambientale*.

The activities of the River basin authority are specified and organised in a River Basin District Plan,<sup>418</sup> which is the instrument for managing the basin district.<sup>419</sup> Its contents are immediately binding.<sup>420</sup> These plans include, amongst others, an assessment of the physical situation of the whole basin, an analysis of the risks for potential degradation; an indication of the necessary works to address the risks of flooding, drought, landslides; a plan for the planning and utilization of water resources, agricultural, forestry and mining; the priority of interventions and their development over time, depending on the severity of the disruption; and an indication of financial resources provided under existing legislation.<sup>421</sup> Once adopted by the River Basin Authority, the plans are subject to an environmental impact assessment<sup>422</sup> before being approved by decree by the Prime Minister, after hearing the opinion of the Regions.<sup>423</sup> In this sense, the River Basin Districts have an important role to play in water service provision, as the quality and availability of raw freshwater and groundwater depends on their activities and management. The decisions taken to protect water quality and issue abstraction permits affect the costs of providing drinking water to particular service standards.

**2.5. Optimal Territorial Areas.** In 1994, the institutional framework in Italy was modified with the creation of the Optimal Territorial Areas.<sup>424</sup> The ATOs

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<sup>418</sup> Article 65, Ibid.

<sup>419</sup> Article 63.7, Ibid.

<sup>420</sup> Article 65.4, Ibid.

<sup>421</sup> Article 65.3, Ibid.

<sup>422</sup> Article 66.1 Ibid.

<sup>423</sup> In the context of the multilateral meetings of the national government and the regions at the Conference Stato-regioni (article 57.1, Ibid.)

<sup>424</sup> Article 8, *Legge 5 Gennaio 1994, N 36, Disposizioni in Materia Di Risorse Idriche*.

are supra-municipal entities with legal personality established in a geographical area defined by the Italian regions.<sup>425</sup> All local authorities and provinces have to adhere to an ATO, and are responsible for establishing its management. The ATOs are responsible for the provision of drinking water and wastewater services to the population in the areas under their jurisdiction. The ATOs Authorities can delegate the responsibilities for carrying out the day-to-day activities for the provision of water services to a third party, i.e. a water operator, which may be of either publicly or privately owned. The ATOs have concentrated the number of responsible bodies in charge of providing water services, from over 8,000 in 1999 (as many as the current Italian local authorities)<sup>426</sup> to around 92.<sup>427</sup> The size of the ATOs varies significantly. In certain cases, their size is the same as that of the Region; in other cases, they are smaller than the province and, in some others, the ATOs occupy only an urban agglomeration. The average population of the ATOs in 2008 was around 600,000 inhabitants.<sup>428</sup>

The ATOs are considered as optimum areas for the management of services of public utility. Each ATO acts as a regulatory body in charge of ensuring the provision of water services in the area under their competence. They led by an

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<sup>425</sup> Early references to the creation of "optimal management areas" for water resources management was made in 1976, *Legge 10 Maggio 1976, N. 319 "Norme Per La Tutela Delle Acque Dall'inquinamento"*. This text was later modified by *Legge 24 Dicembre 1979, N. 650 "Integrazioni E Modifiche Delle Leggi 16 Aprile 1973, N. 171 E 10 Maggio 1976, N. 319"*.

<sup>426</sup> Roberta Ricci, "Co.Vi.R.I. Il Guardiano Dell'acqua," *Lexambiente - Rivista giuridica online a cura di Luca Ramacci*(2009), <http://www.lexambiente.it/index.php/urbanistica/40/rifiuti/155/acque/183/5059-Acque.%20Co.Vi.R.I..html>.

<sup>427</sup> The For a list of the existing ATOs, see Gruppo 183, "Elenco Degli Ato " <http://www.gruppo183.org/ato.html>.

<sup>428</sup> Lorenzo Beardelli and Lorenzo Robotti, "The Water Sector in Italy - Working Paper 2009/01," (CIRIEC, 2009), 11.

Authority, responsible for ensuring the cooperation amongst the local authorities of the ATO, and of supervising the organization and the management of the service within its jurisdiction. The **National Association of Area's Entities and Authorities** (*ANEA - Associazione Nazionale Autorità e Enti di Ambito*) is a non-profit body established in 2004 that brings together all the constituted ATOs,<sup>429</sup> for information exchange and technical and resources advice.<sup>430</sup>

The ATO Authorities have to adopt a management Plan for its territory (*Piano d'ambito*). This plan should include various elements: a survey on the water infrastructure status, a remedial plan for provision of water services, a definition of the organisational and management model for the ATO, and an economic and financial plan on how to address the provision of the service within the area. Much of the information of the Plan derives from the local authorities, which need to guarantee the accuracy of information included in the Plans. Although the Plans are prepared by the ATO Authorities, they need to be sent for ratification to the competent Region and to Ministry of the Environment, which can suggest modifications.<sup>431</sup>

In practice, the setting up and operation of the ATOs has not been without difficulties, partly derived from the resistance of local authorities to forgo the

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<sup>429</sup> See the website of the Associazione Nazionale Autorità e Enti di Ambito, <http://www.associazioneanea.it/>.

<sup>430</sup> Global Water Intelligence, "Italy's Water Future in the Balance," *Global Water Intelligence* 9, no. 4 (2008), <http://www.globalwaterintel.com/archive/9/4/general/italys-water-future-in-the-balance.html>.

<sup>431</sup> Article 149, *Decreto Legislativo 3 Aprile 2006, N 152, Norme in Materia Ambientale*.

provision of a service that was under their competence,<sup>432</sup> and due to the successive changes in the criteria for the determination of the ATOs.<sup>433</sup> Thus, according to a recent dossier by the Government, the ATOs are still being established, fifteen years after their initial constitution. In most cases, ATOs are still being consolidated at the regional scale, following the merger of operators.<sup>434</sup> In addition, more recently, the legislator has decided on the abolishment of the ATO Authority by 27 March 2011.<sup>435</sup> Whereas the ATO areas will continue to exist, they will not be headed by an Authority with legal personality and powers transferred from the local authorities. The law does not include provisions as for who is to be made responsible of carrying out the Authorities' tasks – whether the province, municipalities or other entities or new form of cooperation. It indicates, however, that the Regions should establish, via regional laws, who will exercise these functions, in accordance the principles of “subsidiarity, differentiation and adequacy”. It seems that the objective of the legislator is to transfer the functions of the ATO Authorities to the provinces. For some, the existing overlap of plans, approaches and

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<sup>432</sup> Associazione Nazionale Autorita e Enti di Ambito, "I Servizi Idrici a Quindici Anni Dalla Riforma" (2009), [http://www.associazioneanea.it/documenti/documenti-ufficiali/documenti-politici/ANEA\\_I%20servizi%20idrici%20a%20quindici%20anni%20dalla%20riforma\\_Roma,%2025%20Giugno%202009.pdf](http://www.associazioneanea.it/documenti/documenti-ufficiali/documenti-politici/ANEA_I%20servizi%20idrici%20a%20quindici%20anni%20dalla%20riforma_Roma,%2025%20Giugno%202009.pdf).

<sup>433</sup> For instance, the *Legge 24 Dicembre 2007, N. 244 "Disposizioni Per La Formazione Del Bilancio Annuale E Pluriennale Dello Stato (Legge Finanziaria 2008)"*. According to this law, the establishment of the ATO should give priority to the administrative boundaries of the provinces or group of municipalities.

<sup>434</sup> Governo Italiano, "Servizio Idrico Integrato (Riforma Della Legge Galli)," (2009), [http://www.governo.it/GovernoInforma/Dossier/riforma\\_servizi\\_pubblici/legge\\_galli.html](http://www.governo.it/GovernoInforma/Dossier/riforma_servizi_pubblici/legge_galli.html).

<sup>435</sup> See *Legge 23 Dicembre 2009, N.191 - Disposizioni Per La Formazione Del Bilancio Annuale E Pluriennale Dello Stato (Legge Finanziaria 2010)*. This Act was modified by virtue of the *Legge 26 Marzo 2010, N. 42 "Conversione in Legge, Con Modificazioni, Del Decreto-Legge 25 Gennaio 2010, N. 2, Recante Interventi Urgenti Concernenti Enti Locali E Regioni"*. Article 1, paragraph 1 quinquies of this text abolished the ATO Authorities.

regulations is considered to be the greatest obstacle for an effective water resources and water services management in Italy.<sup>436</sup>

**2.6. Water supply and sewerage companies** participate in the Italian institutional framework. As for April 2008, 64 publicly-owned firms, 31 PPPs, 5 concessions to private firms and 6 other arrangements were established for water provision in Italy, totalling 106 agreements between ATOs and water service providers.<sup>437</sup>

One of the most important water operators in Italy is *ACEA S.p.A.*, the leader in water services provision in Italy.<sup>438</sup> This company manages water services of ATO 2 Roma and of ATO 5 Frosinone, supplying water to 8.3 million people. *ACEA S.p.A.*'s major shareholder is Rome's municipality, which holds 51% of its capital stock. Apart from *ACEA*, *IREN* is a multiutility operating in North West Italy created in 2010.<sup>439</sup> *IREN* is a mixed group company with 33% of its capital stock held by Torino and Genova's municipalities. It supplies now water to more to 2.4 million people. Finally, *HERA S.p.A.* is a multi-utility operating mostly in Emilia-Romagna region serving 168 municipalities and 2.6 millions of people<sup>440</sup>. Apart from the mixed capital companies, *SMAT S.p.A.*<sup>441</sup>

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<sup>436</sup> Lugaresi, "The Situation in Italy". In

[http://www.forumfed.org/libdocs/SpainWater2008/Nicola%20Lugaresi%20en\\_final.pdf](http://www.forumfed.org/libdocs/SpainWater2008/Nicola%20Lugaresi%20en_final.pdf)

<sup>437</sup> Beardelli and Robotti, "The Water Sector in Italy - Working Paper 2009/01." The number of active operators is higher than the number of ATOs because in certain cases the service has been entrusted to more than one operators.

<sup>438</sup> *ACEA S.p.A.*, "The Acea Group,"

<http://www.aceaspa.it/ViewCategory.aspx?lang=en&catid=390e436b8a6e471f867b89c77050c22d>.

<sup>439</sup> *IREN S.p.A.*, "Servizi Idrici Integrati," [http://www.gruppoiren.it/servizi\\_idrici.asp](http://www.gruppoiren.it/servizi_idrici.asp).

<sup>440</sup> Gruppo Hera, "Chi Siamo," [http://www.gruppohera.it/gruppo/chi\\_siamo/](http://www.gruppohera.it/gruppo/chi_siamo/).

<sup>441</sup> *SMAT S.p.A.*, "Il Gruppo Smat," [http://www.smatorino.it/area\\_istituzionale?id=1](http://www.smatorino.it/area_istituzionale?id=1).



and *Abbanoa S.p.A.*<sup>442</sup> are the most important wholly public companies operating in Italy. *SMAT S.p.A.* is responsible for water services provision for 2 million people in the ATO 3 Torinese in Piedmont region. *Abbanoa S.p.A.* manages water services provision in the ATO of Sardinia region, for around 1.6 millions of people. Finally, wholly private companies also operate in Italy. *Acque di Caltanissetta*, for instance, provides water services in the ATO 6 Caltanissetta in Sicily.<sup>443</sup>

## 2.7. Consumer associations

Amongst the most important consumers associations in charge of representing consumers are *Adiconsum* (Associazione Difesa Consumatori e Ambiente - Environment and consumers defence association).<sup>444</sup> *Adiconsum* has around 122,000 members and representatives across the country. Its aim is to protect consumers in the fields of energy, transports, insurances, nutrition, road safety, inland revenue, school & research. Also, *Federconsumatori* aims to inform and to protect consumers' fundamental rights such as, the provision of services of general interest, health, safety, the distribution of information, fairness and clarity of disclosure.<sup>445</sup> *Codacons* is one of the most important consumers associations. It is an "association of associations" constituted by different associations that collaborate to protect consumers' interests in the fields of public services, justice, transports, health and school.<sup>446</sup>

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<sup>442</sup> *Abbanoa*, "La Storia Di Abbanoa," <http://www.abbanoa.it/page.php?p=storia>.

<sup>443</sup> *Acque di Caltanissetta S.p.A.*, "Chi Siamo," <http://www.caltaqua.net/aboutus.php>.

<sup>444</sup> Associazione Difesa Consumatori e Ambiente, "Storia E Profilo Di Adiconsum," [http://www.adiconsum.it/adiconsum/pages/PageArea\\_Detail.aspx?h=46&n=0](http://www.adiconsum.it/adiconsum/pages/PageArea_Detail.aspx?h=46&n=0).

<sup>445</sup> *Federconsumatori*, "Federconsumatori Home Page," <http://www.federconsumatori.it/>.

<sup>446</sup> Coordinamento delle associazioni per la difesa dell'ambiente e dei diritti degli utenti e dei consumatori, "Chi Siamo," <http://www.codacons.it/chisiamo.asp>.

Along with these associations, the association *Gruppo 183* is a non profit organization created by experts, environmentalists, parliamentarians and representatives of regions, local governments, business and union leaders for the promotion of sustainable development policies for soil conservation, protection and rehabilitation of water use and management of water resources.<sup>447</sup> Also, the *Forum italiano dei movimenti per l'acqua* was created to bring together associations, committees, social movements, trade unions and environmental NGOs supporting, amongst others objectives, the abrogation of a national law adopted in 2008,<sup>448</sup> promoting the liberalisation of municipally-owned public services companies including transport, water, electricity, gas and waste collection and disposal.<sup>449</sup>

### 3. LEGAL FRAMEWORK FOR WATER SERVICES PROVISION

The Italian Constitution distributes policy responsibilities among the national government, the regions and the local authorities.<sup>450</sup> Whereas constitutional provisions make reference to environmental protection and service provision, water services are not specifically mentioned in the list of policy areas. Successive legislation has established the responsibilities and the conditions for the exercise of these functions.

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<sup>447</sup> Gruppo 183, "Chi Siamo," [http://www.gruppo183.org/chi\\_siamo.asp](http://www.gruppo183.org/chi_siamo.asp).

<sup>448</sup> In particular, article 23-bis, of the *Legge 6 Agosto 2008, N. 133 Conversione Del Decreto-Legge 25 Giugno 2008, N. 112 - Disposizioni Urgenti Per Lo Sviluppo Economico, La Semplificazione, La Competitività, La Stabilizzazione Della Finanza Pubblica E La Perequazione Tributaria*.

<sup>449</sup> Forum italiano dei movimenti per l'acqua, "Campagna Referendaria L'acqua Non Si Vende," <http://www.acquabenecomune.org/raccoltafirme/>.

<sup>450</sup> Title V, *Constitution of the Italian Republic*.

A key legal text to understand the current legal framework for the management of water resources – including water services provision - and protection from water pollution is the *Decreto Legislativo 3 aprile 2006, n 152, "Norme in materia ambientale"*. This legal text reclassified the entire national environmental legislation – for pollution control, environmental impact assessment, environmental decision-making, etc.<sup>451</sup> Part III of the Decreto, dedicated to water, includes the regulations for water resources and water services management, and has repealed previous legislation on the subject matter.

The text is fundamental in the definition of water environmental standards and the conditions for water resources management. In particular, it transposes the Water Framework Directive, and integrates all water environmental law of EU origin, to ensure its application in Italy. In transposing the WFD, the decree divides the Italian territory into eight River basin districts,<sup>452</sup> and defines environmental and public health standards for water resources.<sup>453</sup> It also ratifies the principle of price-cost recovery into the Italian legislative framework.<sup>454</sup> On this point, the text builds from the national Act 36/94, of 5<sup>th</sup> January 1994, most commonly known as *Legge Galli*, which restructured water services provision in Italy, creating the ATOs and introduced the price-cost recovery.

This decree establishes that all water in Italy - with the exception of rain water stored - is of public ownership. This includes coastal, internal and all

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<sup>451</sup> See Lugaresi, "The Situation in Italy".

<sup>452</sup> Article 64, *Decreto Legislativo 3 Aprile 2006, N 152, Norme in Materia Ambientale*.

<sup>453</sup> Part III, Section II, *Ibid*.

<sup>454</sup> Article 154, *Ibid*.

groundwater.<sup>455</sup> The law revokes previous provisions, by which, by default, water property was assigned to the owner of the land.<sup>456</sup> The state ownership of water was justified as a means for the rationalisation of uses, the limitation of water, and the protection of water assets.<sup>457</sup> The text also indicates that water use should safeguard the rights and expectations of future generations to enjoy an integrated environmental heritage.<sup>458</sup>

Another key legal text regarding water services provision is the *Decreto legislativo 18 Agosto 2000, n 267 "Testo Unico delle leggi sull'ordinamento degli enti locali"*. This general text organises the powers and the procedures followed by local authorities in the exercise of their functions.<sup>459</sup> The text gives local authorities the power to create public limited company, plc. (*Società per Azioni* in Italian) to provide the service.<sup>460</sup> They can also entrust the management of public services to private parties or public-private societies through tender procedures.<sup>461</sup> The text demands that in all cases, the water providers apply water tariffs in agreement with the principle of cost recovery.<sup>462</sup>

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<sup>455</sup> Article 144, *Ibid*. This provision is introduced initially in *Legge Galli*.

<sup>456</sup> For a discussion of the development of the principle of public ownership of water resources in Italy, see Lugaresi, "The situation in Italy".

<sup>457</sup> Article 144, *Decreto Legislativo 3 Aprile 2006, N 152, Norme in Materia Ambientale*.

<sup>458</sup> Article 144.2, *Ibid*.

<sup>459</sup> Article 2, *Decreto Legislativo 18 Agosto 2000, N 267, Testo Unico Delle Leggi Sul'ordinamento Degli Enti Locali*. Local authorities include municipalities, provinces, and metropolitan cities.

<sup>460</sup> Article 116, *Ibid*.

<sup>461</sup> Article 23-bis, *Legge 6 Agosto 2008, N. 133 Conversione Del Decreto-Legge 25 Giugno 2008, N. 112 - Disposizioni Urgenti Per Lo Sviluppo Economico, La Semplificazione, La Competitività, La Stabilizzazione Della Finanza Pubblica E La Perequazione Tributaria*.

<sup>462</sup> Article 117, *Decreto Legislativo 18 Agosto 2000, N 267, Testo Unico Delle Leggi Sul'ordinamento Degli Enti Locali*.

Finally, reference needs to be made to the *Decreto Legislativo 2 febbraio 2001, n. 31 "Attuazione della direttiva 98/83/CE relativa alla qualità delle acque destinate al consumo umano"* transposes and implements the Drinking Water Directive.<sup>463</sup> Its aims is "to protect human health from the adverse effects associated with contamination of water, ensuring its healthiness and cleanliness",<sup>464</sup> according to quality parameters listed in its Annex 1 (*Allegato 1*). The text also indicates how quality controls should be carried out – according to where in the network quality control should be undertaken<sup>465</sup> and the type of controls that should be carried out.<sup>466</sup>

#### 4. PRICE SETTING PROCEDURE AND SERVICE QUALITY SETTING PROCEDURE

The setting of water prices and service quality standards is a responsibility that falls largely on the ATOs Authority. In particular, the ATO Plan is a fundamental document for water pricing and service quality standards setting.<sup>467</sup>

The ATO Plan sets the average ATO tariff for all water users in the area, the tariff structure, and the mechanisms to control the company, as well as the informational requirements and system and the penalties in cases of infringement. To set the tariff, the Ministry for the Environment defines, first, what cost components need to be taken into account, as well as the criteria and methodology to calculate these costs. The ATO Plans specifies the costs of water provision, and the required investment and the related financial

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<sup>463</sup> *Decreto Legislativo 2 Febbraio 2001, N. 31, Attuazione Della Direttiva 98/83/Ce Relativa Alla Qualità Delle Acque Destinate Al Consumo Umano.*

<sup>464</sup> Article 1, Ibid.

<sup>465</sup> Article 5, Ibid.

<sup>466</sup> Articles 6 to 8, Ibid.

<sup>467</sup> Article 149, *Decreto Legislative 3 Aprile 2006, N 152, Norme in Materia Ambientale.*

resources necessary to provide the service. Each ATO Plan needs to ensure the adequate investment to comply with all environmental and public health standards.<sup>468</sup> The plan includes details on the provision of the water as well as the performance targets to be attained.

To calculate the water tariff, the ATO Authorities are asked to follow a mechanism set in 1996 by the national government. This mechanism is called the “normalised method” (*metodo normalizzato*).<sup>469</sup> It takes into account the actual and projected costs and of the operating expenditure, depreciation and a return of capital. The tariff is subsequently updated every year according to inflation levels, and in agreement with a maximum level of increases allowed – the K factor. The pricing model is as follows:

- Actual tariff:  $T_n = (C + A + R)^{n-1} (1 + n + K)$ ;
- $T_n$  : actual average tariff (which is unique for each ATO);
- C: projected Opex (which is modelled for each ATO);
- A: projected capital maintenance charge (which is included in each ATO Plan);
- R: return on projected net investment (Plan). The level for R are fixed at the national level (at around 7%);
- n: officially planned inflation rate;
- K: maximum price increase: fixed at the national level.

As for the tariff structure, Italian users pay a tariff that integrates three parts: drinking water, wastewater and treatment fees. The wastewater and treatment

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<sup>468</sup> Article 154, Ibid.

<sup>469</sup> Decreto 1/8/96 Metodo Normalizzato Per Definire Le Componenti Di Costo E Determinare La Tariffa Di Riferimento.

fees are commonly a fixed value, whereas the drinking water fee usually includes two parts, one fixed and another variable proportional to consumption.<sup>470</sup>

The ATO Authorities need to decide on the company that will provide the service within their jurisdiction, and the management contract that it will establish with the provider. They can choose to establish a concession to public water company, to a private water company, or to establish public-private partnerships with the water provider. The contract is awarded via a tender process, by referring to a set of principles of quality, safety, service provision levels, investment, innovation, economic conditions, etc.<sup>471</sup> Concessions are given every 20-30 years. During this period, the water operator is entrusted with all water infrastructures of the ATO.<sup>472</sup>

It is important to highlight, however, that, according to the Co.N.Vi.RI., the normalized method for water pricing has not been implemented fully.<sup>473</sup> The Co.N.Vi.RI. stresses that many regions have tried to establish their own methods for setting the tariff, which the Constitutional Court has declared outlawed in subsequent decisions by pronouncing that all the procedures and mechanisms for setting the tariffs are the exclusive legislative competence of the State. In addition, the Co.N.Vi.RI. has indicated that the polluter-pays principle has been scarcely applied, due to an insufficient public acceptance of the tariff adjustments. The Co.N.Vi.RI. has manifested that more transparency,

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<sup>470</sup> Beardelli and Robotti, "The Water Sector in Italy - Working Paper 2009/01," 17.

<sup>471</sup> Article 150, *Decreto Legislativo 3 Aprile 2006, N 152, Norme in Materia Ambientale*.

<sup>472</sup> 153, *Ibid*.

<sup>473</sup> Commissione Nazionale di Vigilanza sulle Risorse Idriche, "Relazione Annuale Al Parlamento Sullo Stato Dei Servizi Idrici Anno 2009 " (Rome: Commissione Nazionale di Vigilanza sulle Risorse Idriche, 2010), 70-72.

more information and more interaction between the operators and the users is required to guarantee that the water tariff setting process achieves stronger backing and support from the public.<sup>474</sup>

## 5. WATER GOVERNANCE IN ITALY

### 1.1. Access to information

The Italian regulatory framework ensures access to information on water services provision for consumers by different means. Legal provisions exist to guarantee that all ATOs disseminate information on the activities that they carry out, including measures concerning technology, operation of equipment, quantity and quality of water supplied and treated.<sup>475</sup> In particular, the Charter of Services and the ATO Plans are administrative documents that are available to the public to be consulted.<sup>476</sup>

The Charter of Services (*Carta dei servizi*), or, is the document that enunciates the service that consumers can expect from the water operator. It indicates the quality standards of the services delivered, as well as instructions for consumers on how to access information, the safeguards available to water users (to lodge a complaint, to start judicial actions as well as to initiate conciliation procedures).<sup>477</sup> In this sense, it works as an agreement between operators and users on the standards of service and on the mechanisms to

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<sup>474</sup> Ibid., 71.

<sup>475</sup> 162.1, *Decreto Legislativo 3 Aprile 2006, N 152, Norme in Materia Ambientale*.

<sup>476</sup> 162.2, Ibid.

<sup>477</sup> Article 2, para 461, *Legge 24 Dicembre 2007, N. 244 "Disposizioni Per La Formazione Del Bilancio Annuale E Pluriennale Dello Stato (Legge Finanziaria 2008)"*.



protect consumers' rights<sup>478</sup>. For their part, the ATO Plans diagnose the existing operating and investment assets, and plan the financial investment and infrastructures that are to be developed in the area, including the tariffs that are to be charged to water users.

Both the Charter of Services and the ATO Plans are developed independently in each of the ATO areas. Although national law defines the minimum content that these documents should contain, no common provision exists to facilitate the comparability of the information given to the public. Thus, the information provided by the ATOs varies in precision, completeness and timeliness. Information on the tariffs, the evolution of the service quality standards, the approved investments for the area is given for certain ATOs, whereas others are less detailed.<sup>479</sup> In general, however, these documents do not refer to the reasons for the setting of a particular water tariff, or contractual information regarding investment, operating costs, etc. which is thus excluded from the consumers.<sup>480</sup>

For their part, the national and regional authorities are also required to publicise information on water resource management projects.<sup>481</sup> They need to ensure the publication of all documents dealing with the organization,

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<sup>478</sup> Commissione Nazionale di Vigilanza sulle Risorse Idriche, "Relazione Annuale Al Parlamento Sullo Stato Dei Servizi Idrici Anno 2009 ", 76.

<sup>479</sup> Compare the Carta dei Servizi of the ATO Bologna and ATO Lazio Centrale. See Agenzia di ambito per i servizi pubblici di Bologna, "Carta Del Servizio Pubblico Relativa Al Servizio Idrico Integrato," (Bologna: Agenzia di Ambito di Bologna, 2008). Ambito Territoriale Ottimale Lazio Centrale, "Disciplina Del Rapporto Con L'utenza - Carta Del Servizio Idrico Integrato," (Roma: Autorità dell'Ambito Territoriale Ottimale 2 Lazio Centrale, 2002).

<sup>480</sup> Interviewee 5.

<sup>481</sup> Article 23, *Legge 7 Agosto 1990, N. 241 Nuove Norme Sul Procedimento Amministrativo*.

functions, objectives, processes of their activities.<sup>482</sup> Certain exceptions apply to this obligation, such as when documents are covered by State secret, refer to tax procedures, general administrative planning and programming and or contain personal information about third parties during recruitment processes.<sup>483</sup> In particular, access to environmental information has received particular protection with the adoption of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters.<sup>484</sup> According the text, Italian authorities are obliged to disseminate environmental information, facilitate access to environmental information and that applicants are not required to provide an explanation for their information request. Thus, the Italian regulatory framework guarantees the right of anyone, without having to prove the existence of a legal interest, to 'access to information about the status of the environment and landscape in the country'.<sup>485</sup>

Public authorities use official diaries and national and local newspapers to meet this obligation. At the national level, the Co.N.Vi.RI. has also carried out important activity to inform the public on the status of water services provision, via the publication of research papers and reports available online. It is also required to report annually to Parliament on the activities and progress of all ATOs. These reports are public and can be accessed online.<sup>486</sup>

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<sup>482</sup> Article 26, Ibid.

<sup>483</sup> Article 24, Ibid.

<sup>484</sup> Legge 16 Marzo 2001, N. 108 "Ratifica Ed Esecuzione Della Convenzione Sull'accesso Alle Informazioni, La Partecipazione Del Pubblico Ai Processi Decisionali E L'accesso Alla Giustizia in Materia Ambientale, Con Due Allegati, Fatta Ad Aarhus Il 25 Giugno 1998".

<sup>485</sup> Article 3-sexies, Decreto Legislativo 3 Aprile 2006, N 152, Norme in Materia Ambientale.

<sup>486</sup> See Commissione Nazionale di Vigilanza sulle Risorse Idriche, "Rapporti E Studi " [http://www.conviri.it/page\\_06.html](http://www.conviri.it/page_06.html).

Since 1990, Italy has a **Committee on Access to Administrative Records** (*Commissione per l'accesso ai documenti amministrativi*)<sup>487</sup> to which citizens can appeal if they consider their right to information to be breached. The Committee is made up by 12 members, including 2 senators and 2 deputies, appointed by presidents of the respective Houses; 4 judges and State lawyers designated by their respective organ of self-government; 2 of the administrative law professors, appointed by the Ministry of Education, University and Research; 1 representative of the State or a public body, designated by the Department of Public Service and the Secretary to the Prime Minister, who gives the organizational support for the operation of the Commission and presides the meetings. Appeals to the Commission are free, and governed by a code on the access to administrative documents, which has been proposed by the President of the Council of Ministers and adopted by the President of the Republic.<sup>488</sup>

In this sense, the Italian regulatory framework has included provision to guarantee that the decisions taken by public authorities are available to the public. Responsible bodies and relevant authorities have to issue and make available information regarding the provision of water services. The kind of information they provide, however, varies across jurisdictions, as public authorities and water operators have certain degree of discretion to decide on the content and the format of the information they produce. The reduction in the number of responsible authorities, from over 8000 local authorities to 92

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<sup>487</sup> Article 27, *Legge 7 Agosto 1990, N. 241 Nuove Norme Sul Procedimento Amministrativo*.

<sup>488</sup> *Regolamento Di Esercizio Del Diritto Di Accesso Ai Documenti Amministrativi* in [http://www.governo.it/Presidenza/DICA/4\\_ACCESO/documentazione\\_accesso/Regolamento\\_accesso.pdf](http://www.governo.it/Presidenza/DICA/4_ACCESO/documentazione_accesso/Regolamento_accesso.pdf)

ATOs has concentrated the water industry, but comparing the activities of the water providers according to common benchmark is still difficult.

## 1.2. Public participation

The Italian regulatory framework has included provisions to facilitate public participation in water policy.<sup>489</sup>

Particular provisions are made to establish mechanisms of participation when the proposed measures are likely to have environmental impact.<sup>490</sup> In these cases, national and regional authorities are required to publish first a proposal of the plan or programme that it aspires to implement, along with a preliminary report on any possible environmental impact, on the national official journal (*Gazzetta Ufficiale*) or regional official journals and on the interested authority web site. Within 60 days of its publication, any interested party can submit their opinion and provide new or additional relevant information for consideration.<sup>491</sup> After this period, the authority needs to publish the final decision, along with the rationale of such decision and an explanation of how it takes into account the input from the parties consulted.<sup>492</sup>

Also, water users can intervene in the preparation, review and updating of basin plans. Documents concerning the management of the resources in each river basin district must be published and made available for public consultation for a minimum period of six months to allow the submission of

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<sup>489</sup> *Decreto Legislativo 3 Aprile 2006, N 152, Norme in Materia Ambientale.*

<sup>490</sup> In Part II, Titles II and III, *Ibid.*

<sup>491</sup> Article 14, *Ibid.*

<sup>492</sup> Article 17, *Ibid.*

written comments.<sup>493</sup> Such documents include a timetable and work program for the presentation of the plan, an interim overview of the main problems of water management and draft copies of the plan for the basin.<sup>494</sup>

As well as collaborating with consultation proceedings, water users are given the opportunity to be “actively involved” in the design of the Basin Plan.<sup>495</sup> This “active involvement” includes participation in meetings and seminars discussion on the objectives and working practices in the basin plan and their cooperation in the proposal, development and definition of solutions and measures. These actions may be undertaken through workshops and meetings with key social and economic actors affected by the implementation of the measures.<sup>496</sup>

Regarding the provision of water services, the regulatory framework also includes some requirements to involve water users. In particular, consumers are to be consulted for the drafting of the Charter of Services, which establishes the standards of quality of service provided by the water operator. This charter must be written and published with the collaboration of users associations, which have to be consulted. These consultations should give opportunities to consumers to verify that both quantitative and qualitative parameters for water services are in line with users’ needs. In addition, according to the law,

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<sup>493</sup> Article 66.7, Ibid.

<sup>494</sup> Ibid.

<sup>495</sup> Ministero dell'Ambiente e della tutela del territorio e del Mare, "Partecipazione Pubblica Nella Gestione Delle Acque,"

<http://www.direttivaacqua.minambiente.it/partecipazione.html#parte>.

<sup>496</sup> Ibid.

yearly meetings between operator, authority and users associations need to be set up for a regular monitoring of the activities of the water operator.<sup>497</sup>

Although mechanisms exist for participation in water resource management and water services provision, participation is still considered one of the main weaknesses in the regulatory system. The Co.N.Vi.RI., in particular, has highlighted the need of measures to improve the actual realisation of public participation by water users. They have stressed that, over time, consumers have grown increasingly distrustful of the progress that their contribution may have in regulating the service, so further measures need to be taken to ensure the actual participation of water users in practice.<sup>498</sup> The lack of homogenous data for an appropriate comparison and benchmarking of water service provision in Italy restricts the existence of a meaningful debate and participation about water provision and favours ideological approach to water management. Public debate develops with little hard information, and tends to be passionate and vague. Improvement in information quality is necessary for a good quality public debate, to compare management models and make evidence-based policy.<sup>499</sup>

### 1.3. Access to justice

If Italian consumers consider that water services are falling short from certain standards, or if they disagree with the setting of water tariffs, they have

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<sup>497</sup> Article 2 para 461, *Disposizioni Per La Formazione Del Bilancio Annuale E Pluriennale Dello Stato (Legge Finanziaria 2008)*.

<sup>498</sup> Commissione Nazionale di Vigilanza sulle Risorse Idriche, "Relazione Annuale Al Parlamento Sullo Stato Dei Servizi Idrici Anno 2009 ", 76.

<sup>499</sup> Interviewee 5

recognised rights to ask for the decision to be revised and corrected. The means to challenge these decisions are both non-judicial and at the courts.

When consumers' complaints are raised against a water operator, the most immediate mechanisms to ask for a review of a decision are contained in the Charter of services. This document needs to inform consumers about the mechanisms that they can initiate if they wish to raise a complain about the service provided, or if they consider that their consumer rights or their particular interests have been violated.<sup>500</sup> The Charter of Services are different in the different ATOs, depending on the conditions that the ATO Authorities negotiate and agree with the water providers. The mechanisms may consists in sets of rules for dealing with complaints, or references to facilities to initiate complaining procedures, such as customers service telephone number, email or postal addresses, or consumers intermediaries.

In addition, every Charter needs to include a "conciliation procedure" that water users can initiate either individually or as members of a consumer association before they initiate appeals to a judge against the actions carried out by a water operator. By virtue of this procedure, consumers can raise their concern before the Chamber of Commerce, Industry, Trade and Agriculture competent in their local area.<sup>501</sup> The representative of the Chamber of Commerce mediates between the water provider and the consumers to try to reach to an agreement that satisfies the parts. The conciliation report, signed by

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<sup>500</sup> Article 30, *Legge 18 Giugno 2009, N. 69 "Disposizioni Per Lo Sviluppo Economico, La Semplificazione, La Competitività Nonché in Materia Di Processo Civile"*.

<sup>501</sup> Article 140.2, *Decreto Legislativo 6 Settembre 2005, N. 206 "Codice Del Consumo"*.

all the parts, is then transmitted to a court where the judge makes it enforceable.<sup>502</sup>

When consumers' complaints regard the activities of the administration, and not the water operator, consumers can address the administration itself to ask for a review of a decision, by means of a *ricorso*, or administrative appeal. These appeals are not compatible with judicial appeals, so, when both proceedings are initiated, the judicial appeal prevails over the administrative appeal, which is cancelled.

Different types of administrative appeals exist:

- The *Ricorso in Opposizione* is an appeal submitted by a citizen against an administrative body that issues a contested decision.<sup>503</sup> The appeal needs to be lodged within thirty days from the date of service of the decision.<sup>504</sup> After collecting all required information<sup>505</sup>, the administrative body dealing with the complaint has to issue a justified decision, which is communicated to the applicant and any other interested parties<sup>506</sup>.
- The *Ricorso Gerarchico Proprio* is a particular administrative appeal against a decision or an act that violates a "legitimate" right of an individual.<sup>507</sup> It needs to be submitted to the body/entity/agency that is hierarchically higher than the one that produced the document object of

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<sup>502</sup> Article 140.3-4, Ibid.

<sup>503</sup> Article 7, *Decreto Presidente Della Repubblica 24 Novembre 1971, N. 1199 "Semplificazione Dei Procedimenti in Materia Di Ricorsi Amministrativi"*.

<sup>504</sup> Article 2, Ibid.

<sup>505</sup> Article 4, Ibid.

<sup>506</sup> Article 5, Ibid.

<sup>507</sup> Chapter I, Ibid.



the appeal.<sup>508</sup> The proceeding followed is the same as with the *ricorso in opposizione*.

- The *Ricorso Gerarchico Improprio* can be initiated in cases when there is no hierarchically higher entity than the one that produced the act. This appeal is presented to a completely different institution with no direct hierarchical powers, but entitled to revise the decision on legal grounds or substantive reasons. The decisions of the body dealing with the complaint take full effect.
- At last, a citizen can initiate a *Ricorso Straordinario al Presidente della Repubblica*, which is the final administrative measure that can be initiated in absence of hierarchically higher entity and an administrative body with reviewing powers.<sup>509</sup> In these cases, the appeal is lodged at the entity that took the decision or at the responsible Ministry.<sup>510</sup> The decision of the extraordinary appeal is taken by the President of the Republic following advice from the Ministries.<sup>511</sup>

Along with the internal measures to initiate a review of the decisions, external administrative mechanisms exist to try to introduce corrections.

When the contested decision is taken by a water operator, the main powers to discipline and correct the decision belong to the ATO Authority.<sup>512</sup> According to the law, the ATO Authorities can act to ensure the appropriate performance of the water company operating in the ATO region. If the operator persists in

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<sup>508</sup> Article 1, Ibid.

<sup>509</sup> Article 8, Ibid.

<sup>510</sup> Article 9, Ibid.

<sup>511</sup> Article 14, Ibid.

<sup>512</sup> Article 152, *Decreto Legislativo 3 Aprile 2006, N 152, Norme in Materia Ambientale*.

its failure to perform, and without prejudice to any other penalties against him, the ATO Authority can terminate and revoke the contract authorising the water provider to operate in the area. The Authority can then replace the revoked water operator with another water company, in compliance with the existing rules on public procurement. Furthermore, if the regional government finds that the ATO Authority is not acting against a failing water provider, they can themselves intervene. Ultimately, the Ministry of the Environment holds also responsibilities to monitor the water providers' performance in all the ATOs area, and is entitled to remove the license to operate from the water provider if the ATO authorities or the regional governments do not do so.<sup>513</sup>

If consumers consider that public authorities, and not the water companies, are not carrying out their functions as relevant authorities for the provision of local services, they can also initiate external mechanism against the administration by means of an appeal to the “**Difensore Civico**”, or Ombudsperson.<sup>514</sup> Unlike in other countries where the Ombudsperson has national jurisdiction, the *Difensore Civico* in Italy has a more local character. S/He works as the local guarantor for the good performance and fairness of public administration at municipal, provincial and regional levels. The *Difensore* is in charge of the defence and the protection of rights and legitimate interests of citizens against actions of the public administration. S/He is elected by the municipal council (in this case the difensore is called *Difensore Civico Comunale*), provincial

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<sup>513</sup>Article 152, Ibid.

<sup>514</sup>Article 11, *Decreto Legislativo 18 Agosto 2000, N 267, Testo Unico Delle Leggi Sul'ordinamento Degli Enti Locali*.

council (*Difensore Civico Provinciale*) or regional council (*Difensore Civico Regionale*). Nowadays, 674 *Difensore* are registered in Italy<sup>515</sup>.

Everyone living in the area under the jurisdiction of the *Difensore Civico* can make a petition before them: individual citizens, committees, associations, legal persons, foreigners or stateless residents, residents in the municipality, in the province or region. When someone recognizes a failure or a malfunction by the public administration, they can contact the *Difensore Civico*, who listens to the citizen and examines the petition. If the appeal is admissible, it investigates on the issue. The *Difensore Civico* has access to all kinds of document related to the appeal and can interview the public administration and the direct responsible in order to seek a solution. It attempts friendly solutions, sending reminders to the offices concerned, giving information on rights and duties, viable ways and offices or agencies to be contacted. In any case, the appeal to judicial or administrative tribunals does not exclude or limit the right to appeal to the *Difensore Civico*.

Finally, consumers can appeal in Court against decisions they consider unlawful. Depending on who is responsible for these decisions, consumers can appeal to administrative courts for reviewing acts by public authorities, or to ordinary courts when they consider that water operators are breaching their contracts.

Access to justice for administrative decisions is a constitutional right<sup>516</sup>. Citizens can appeal in first instance to the Regional Administrative Tribunal

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<sup>515</sup> In L'eco de la difesa Civica, "Difensore, Dove Sei?," <http://www.difesacivica.it/>. Consulted on 13 October 2010.

(T.A.R. - *Tribunale Amministrativo Regionale*), which are based in each of the Italian regions<sup>517</sup>. The T.A.R.s have jurisdiction on cases concerning public services, in particular about disputes relating to acts and measures relating to the concession of public assets, with the exception of disputes assigned to the courts of public waters and of the High Court of Public Waters<sup>518</sup> - see below. Also, they have jurisdictions over disputes on public services relating to public service concessions, over disputes relating to actions taken by the public administration or the operator of a public service, and also over cases relating to the contracting out of a public service, and the supervision and control over the operator.<sup>519</sup> Moreover, the T.A.R. can intervene in general disputes relating to procedures of entrusting public works, services or supplies of services.<sup>520</sup>

Consumers can challenge a decision of the Public administration if they consider that it violates their “legitimate interest.”<sup>521</sup> For the trial before the administrative court, the reporting party asks the court to cancel the administrative act or decision that violated their right. At this stage, the reporting party may also ask for a compensation.<sup>522</sup>

If consumers disagree with a decision of the T.A.R., they can appeal to the Council of State (*Consiglio di Stato*), at the national level.<sup>523</sup> The Council of State is a legal-administrative consultative body in charge of ensuring the legality of

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<sup>516</sup> Article 113, *Constitution of the Italian Republic*.

<sup>517</sup> Article 5, *Decreto Legislativo 2 Luglio 2010, N. 104 Attuazione Dell'articolo 44 Della Legge 18 Giugno 2009, N. 69, Recante Delega Al Governo Per Il Riordino Del Processo Amministrativo*.

<sup>518</sup> Article 133.b, *Ibid.*

<sup>519</sup> Article 133. c, *Ibid.*

<sup>520</sup> Article 133, e-1, *Ibid.*

<sup>521</sup> Article 7, *Ibid.*

<sup>522</sup> Libro II, Titolo I, Capo I, *Ibid.*

<sup>523</sup> Article 6 *Ibid.*

public administration.<sup>524</sup> Citizens can initiate appeals against the decisions of the Council at the Supreme Court of Cassation (*Corte Suprema di Cassazione*) which is responsible for ensuring consistency in the interpretation of the laws and is a court of last resort in Italy, and so it ends all judicial proceedings.<sup>525</sup>

When the disputes regard the activities of the water operators, consumers can appeal not before administrative courts, but before the ordinary tribunals with general jurisdiction to deal with cases of breach of contract. However, this distinction is not always clean-cut, and at times contradictory. For instance, with regards to disputes of the tariffs set in a ATO, different decisions have given jurisdiction to different courts. In a particular case raised in a ordinary court at Latina, it was declared that, given that tariffs are set by ATOs, all appeals should be settled by Administrative courts,<sup>526</sup> whereas in a decision by the T.A.R. of the Region of Abruzzo, the decision indicated that “disputes involving a contract for the supply of drinking water for domestic use should be considered attributed to the ordinary courts even if the party disputes the legitimacy of the administrative provisions of pricing, because the object of the dispute is a source of contractual rights”.<sup>527</sup> Therefore, the boundaries of jurisdiction between the different courts are not clear, and depend on the particularities object of the dispute.

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<sup>524</sup> Article 100, *Constitution of the Italian Republic*.

<sup>525</sup> Libro III, Titolo V, *Decreto Legislativo 2 Luglio 2010, N. 104 Attuazione Dell'articolo 44 Della Legge 18 Giugno 2009, N. 69, Recante Delega Al Governo Per Il Riordino Del Processo Amministrativo*.

<sup>526</sup> Tribunale Ordinario di Latina - sez. I civile, "Ordinanza 13 Luglio 2006," <http://www.ambientediritto.it/sentenze/2006/Tribunali/Tribunale%20Latina%2013lug2006%20ord.htm>.

<sup>527</sup> T.A.R. Abruzzo, "Acqua - Contratti Di Fornitura Di Acqua Potabile - Controversie - Contestazione Della Legittimità Del Provvedimento Amministrativo Di Fissazione Delle Tariffe - Giurisdizione - Giudice Ordinario, Pescara - 4 Marzo 2006, N. 151 " <http://www.ambientediritto.it/Giurisprudenza/2006/ACQUA.htm>.

Apart from the T.A.R. and the ordinary courts, the Constitution allows the establishment of specialised institutions under the auspices of the ordinary courts. Since the 1930s, Italy has had Regional courts specialised in dealing with cases concerning public waters.<sup>528</sup> They are established within the 8 Courts of Appeals and composed by ordinary judges and citizens external to the legal profession. They have jurisdiction for questions relating to the state ownership of waters, the exclusive use of public waters, the carrying out the construction of waterworks, underground water and fees paid by consortiums for the use of public waters. The decisions of the Regional courts for public waters may be appealed before the Higher Court for Public Waters (*Tribunale Superiore delle Acque Pubbliche*), which is housed in Rome at the Supreme Court of Cassation and has national jurisdiction.<sup>529</sup>

For all judicial proceedings, fees apply in proportion with the dispute's value. A threshold applies for receiving free legal assistance by the State. According to some experts consulted, the costs of bringing the cases to justice frequently outweigh the benefits of doing so, particularly as the most common cases of deficient service are related to faulty customer service, leakages, disrupted service. These "small" problems do not generally justify the "hassle" and costs of entering into a judicial review, so it may be necessary to develop automatic mechanisms to protect consumers' interests and restore damage without

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<sup>528</sup> Articles 138 to 144, *Regio Decreto* 11 December 1933 N. 1775, "*Testo Unico Sulle Acque*" . Their functions were subsequently modified by *Legge* 26 Febbraio 2004, N. 45, *Conversione in Legge, Con Modificazioni, Del Decreto-Legge* 24 Dicembre 2003, N. 354, *Recante Disposizioni Urgenti Per Il Funzionamento Dei Tribunali Delle Acque, Nonché Interventi Per L'amministrazione Della Giustizia*.

<sup>529</sup> See European Judicial Network in civil and commercial matters, "Organisation of Justice - Italy," [http://ec.europa.eu/civiljustice/org\\_justice/org\\_justice\\_ita\\_en.htm](http://ec.europa.eu/civiljustice/org_justice/org_justice_ita_en.htm).

employing judicial mechanisms. Measures to provide automatic compensation for service failures (as employed in other utilities) are instruments that deserve consideration by the responsible authorities.<sup>530</sup>

## 6. CONCLUSIONS

The institutional framework for water services provision in Italy has been in a process of constant change during the last 15 years. These modifications have aimed at setting up supramunicipal entities (ATOs) responsible for the provision all water services within their jurisdiction. For this purpose, ATOs need to delegate the provision of the service to a water operator, either public or privately owned, which needs to comply with environmental, public health and customer standards, and to decide on water prices by following a tariff setting system developed at the national level and applicable across the country.

Regarding water services governance, the chapter has found that the Italian regulatory framework has included measures to guarantee access to information and mechanisms to ensure that consumers can exercise this right. In this sense, it introduces certain provisions regarding the availability of the information, albeit not about the content of the information that water operators have to supply to consumers. As for participation, consultation is the most common method for involving consumers in decision-making process, both for water resources management and for water services provision, particularly in the setting of consumers' standards. Mechanisms for access to justice have also been developed as part of the regulatory framework. These

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<sup>530</sup> Interviewee 5.

measures have aimed to guarantee that proceedings to set water prices and customer standards are compliant with legal provisions, so access to justice focuses above all on guaranteeing compliance with procedural rules, and less on the substance of the decision.



## CHAPTER 7. THE NETHERLANDS<sup>531</sup>

### 1. INTRODUCTION

The Netherlands is a densely populated, water-rich country. Its over 16 million inhabitants have access to around 5,736 m<sup>3</sup> per person/year, the highest rate for the countries considered in the present report. The particular geographical circumstances of the Netherlands have imposed great challenges to water management in the country. The western and northern parts of the Netherlands lie in the estuarine area of three rivers - the Rhine, the Meuse and the Scheldt – and large areas of the country are situated below mean sea level. This situation has forced public authorities to develop protection through enhanced sea defences early on, in an effort to gain land to the advance of the sea level. The Netherlands has a long tradition for water management and water regulation.

Regarding water services, the Netherlands has developed a unique regulatory and institutional system. Local, regional and river basin authorities are responsible for the provision of water supply and sewerage to around 7 million households. The responsibility for drinking water supply is delegated to publicly owned companies, which have to meet statutory environmental and public health standards and other voluntary measures agreed with their shareholders - the local and regional authorities.

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<sup>531</sup> This chapter has been written with the research assistance of Charlotte Herman, LL.M. Energy and Environmental Law, Leuven University.

The analysis of water governance in the Netherlands shows that the Dutch model is based on strong mechanisms for access information and access to justice. Either mandated by regulation or voluntarily, public authorities and water companies produce and make available large amount of information. Mechanisms also exist at the national level to address any failure to provide information by any public authorities. Legal provisions also exist to ask for the administrative and judicial review of decisions concerning water tariffs and service standards, as procedures exist to redress orders within the administration, at the court, and with a *Nationale Ombudsman*. As for participation, this has been, however, rather limited, with consumers having only reduced opportunities to introduce their preferences into the decision making process for setting prices and standards of service. The representation of consumers' interests is indirect, via local representatives in the Dutch municipalities, regions and water boards.

Demographic data	
Total population	16.2 million
Urban population (%)	66%
Number of households	7 million <sup>532</sup>

Natural resources data	
Water availability per person per year	5,506 m <sup>3</sup> <sup>533</sup>
Average water use per person per day	127.5 litres (2007) <sup>534</sup>
Average water bill	€485/year <sup>535</sup>

Allocation of roles between public authorities
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<sup>532</sup> Netherlands Environmental Assessment Agency, "Dutch Population and Number of Households, 1980-2002," Netherlands Environmental Assessment Agency, , <http://www.mnp.nl/mnc/i-en-0001.html>.

<sup>533</sup> Food and Agriculture Organization of the United Nations, "Aquastat." <http://www.fao.org/nr/water/aquastat/data/query/index.html?lang=en>.

<sup>534</sup> Vewin, "Dutch Drinking Water Statistics 2008," (Ruswick2010).

<sup>535</sup> Ibid.

<b>Responsible body for drinking and waste water provision</b>	Municipalities for waste water collection
	Regional and municipalities for drinking water
	Water boards for waste water treatment
<b>Other relevant authorities</b>	National government for laws and regulations
	Water boards for water resource management

<b>Management models for water utilities</b>	
<b>Types of operators active in the country</b>	Direct public management
	Publicly owned entities
<b>Infrastructure ownership</b>	Public authorities
<b>Forms of public-private partnership</b>	N/A

## 2. INSTITUTIONAL FRAMEWORK

Unlike other countries, drinking water, sewerage system and wastewater treatment in the Netherlands are the responsibility of one single authority, but of different tiers of government that hold different competences. Water governance in the Netherlands is best defined as a vertically integrated water industry, owned completely by the government, with competences divided functionally amongst different territorial authorities: local governments, regional authorities, national government, and water boards.<sup>536</sup>

### 2.1. Municipalities

The Netherlands is divided into municipalities. In 2009, 441 municipalities of various sizes existed, some with over 800,000 inhabitants (Amsterdam)

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<sup>536</sup> See Netherlands Water Partnership, "Drinking Water & Industrial Water Supply," <http://www.waterland.net/index.cfm/site/Water%20in%20the%20Netherlands/pageid/D84BC5B4-CB76-5B88-866053E344F48FC9/index.cfm/drinking%20water%20and%20industrial%20water%20supply>.

whereas the smallest was of around 800 inhabitants. Municipalities are governed by a local assembly, elected every four years, and headed by a mayor and an *Alderman* (or executive council), that legislates on matters under their jurisdiction. Dutch municipalities are in charge of service provision for urban development, including activities such as transport and land management, along with matters such as social affairs, welfare and education.<sup>537</sup> In matters of water resources management and services, Dutch municipalities are in charge of collection of domestic waste water<sup>538</sup> and the maintenance of the municipal sewerage system.<sup>539</sup> To carry out these tasks, municipalities are entitled to charge taxes to cover the costs of providing the service.<sup>540</sup> This tax is known as the '*Precario*' tax, and it is charged to all water consumers through their water bill.

## 2.2. Provinces

The Netherlands is divided into 12 provinces: Drenthe, Flevoland, Friesland, Gelderland, Groningen, Limburg, North Brabant, North Holland, Overijssel, South Holland, Utrecht and Zeeland. The provinces are administrative entities governed by a provincial parliament, an executive and a president appointed by national ministries. Each province includes a variable number of municipalities. The competences of the provinces include land management, transport and regional infrastructure and housing amongst others. Regarding

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<sup>537</sup> Their functions are regulated in *Wet Van 14 Februari 1992, Houdende Nieuwe Bepalingen Met Betrekking Tot Gemeenten* (Local Government Act).

<sup>538</sup> Article 10.33 *Wet Van 13 Juni 1979, Houdende Regelen Met Betrekking Tot Een Aantal Algemene Onderwerpen Op Het Gebied Van De Milieuhygiëne*. ( Environmental Management Act)

<sup>539</sup> Article 3.4, *Wet Van 29 Januari 2009, Houdende Regels Met Betrekking Tot Het Beheer En Gebruik Van Watersystemen* (Water Act 2009).

<sup>540</sup> Article 228a, *Wet Van 14 Februari 1992, Houdende Nieuwe Bepalingen Met Betrekking Tot Gemeenten* (Local Government Act)

water resources management, the Dutch provinces are in charge of managing groundwater resource access, affecting, albeit indirectly, the provision of water services, as regions are responsible of ensuring the quality of groundwater and issue water abstraction permits.<sup>541</sup>

To carry out their activities, provinces are required to develop regional water plans, which have to contain the principal provisions for managing groundwater resources in their jurisdictions.<sup>542</sup> The provinces tax water companies for abstracting that water that they will supply to consumers. The taxes charged to water companies vary from province to province, which explains in part the variation in consumers' water bills.<sup>543</sup>

### 2.3. Water companies

Water supply is provided by 10 water companies, which operate in 10 different regions in the Netherlands. Local municipalities and regions delegate the functions for water supply to these water companies, and maintain a role as shareholders – local and regional representatives sit on the managerial boards of the water companies.<sup>544</sup> Hence, they have important functions such as the determination of the water bill rates and the conditions for water service provision.<sup>545</sup>

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<sup>541</sup> Article 6.4, *Wet Van 29 Januari 2009, Houdende Regels Met Betrekking Tot Het Beheer En Gebruik Van Watersystemen* (Water Act).

<sup>542</sup> Article 4.4 Ibid.

<sup>543</sup> Vewin, "Water Supply Statistics," (Rijswijk: Vewin - Association of Dutch Water Companies, 2007), 23.

<sup>544</sup> Article 1(f) *Wet Van 6 April 1957, Houdende Regelen Met Betrekking Tot Het Toezicht Op Waterleidingbedrijven En Tot De Organisatie Van De Openbare Drinkwatervoorziening* (Water Supply Act)

<sup>545</sup> Vewin, "Reflections on Performance 2006: Benchmarking in the Dutch Drinking Water Industry," ed. Vewin (2007).

Water companies are in charge of providing safe drinking water to consumers across the Netherlands. As such, they extract, treat and purify water. They are also responsible for ensuring the management and quality of all pipes up to the home water meter. The currently existing water companies are the following:

1. Waterbedrijf Groningen;
2. Waterleidingmaatschappij Drenthe (also known as WMD Water);
3. PWN Waterleidingbedrijf Noord-Holland;
4. Vitens;
5. Waternet;<sup>546</sup>
6. Duinwaterbedrijf Zuid-Holland (also known as Dunea);
7. Oasen;
8. Brabant Water;<sup>547</sup>
9. Evides (or Evides Waterbedrijf)
10. Waterleiding Maatschappij Limburg (also known as WML)

Each Dutch water company serves an average between 430,000 and 2.4 million consumers. With the exception of Waternet, which is a foundation, the water supply companies are limited liability companies. Apart from the 10 drinking water companies, other smaller private water companies also operate in the

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<sup>546</sup> Waternet is the only Dutch company that provides drinking water supply, sewerage, and wastewater treatment in one territory – the city of Amsterdam.

<sup>547</sup> Brabant Water took over aken over the company Tilburg Waterleidingmaatschappij in 2007 – Until then, there were 11 water companies. See Brabant Water, "Tilburg En Goirle Krijgen Drinkwater Van Brabant Water (30-11-2007) " [http://www.brabantwater.nl/NL/overbrabantwater/pers/Pages/TilburgenGoirlekrijgendrinkwatervanBrabantWater\(30-11-2007\).aspx](http://www.brabantwater.nl/NL/overbrabantwater/pers/Pages/TilburgenGoirlekrijgendrinkwatervanBrabantWater(30-11-2007).aspx).

Netherlands.<sup>548</sup> All of them, but one private company, Bronwaterleiding Doorn,<sup>549</sup> are members of the Association of Dutch Water Companies (*Vereniging van Waterbedrijven in Nederland* - VEWIN), which represents their interests.

#### 2.4. National Government: Ministries.

At the national level, various ministries have responsibilities for the development of a national policy for water resources. Amongst them are the Ministry of Transport, Public Works and Water Management, which is responsible for flood protection and defences and water management (quality and quantity).<sup>550</sup> The Ministry of Housing, Spatial Planning and Environment carries out policies on water pollution control, emission standards, environmental impact assessments of water plans, drinking water control, etc. Along with the Institute for Inland Water Management and Wastewater treatment, this Ministry is the main preparatory body for new water legislation. It also supervises the quality of the drinking water produced.<sup>551</sup> In addition, the

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<sup>548</sup> Such is the case of Watertransportmaatschappij Rijn-Kennemerland (WRK) and Waterwinningsbedrijf Brabantse Biesbosch (WBB). The management of WRK is hosted by Waternet and PWN, the management of WBB is hosted by Evides.

Watertransportmaatschappij Rijn-Kennemerland and Waterwinningsbedrijf Brabantse Biesbosch do not distribute drinking water themselves but deliver partly treated water (other water) to associate companies. See Vewin, "Water Supply Statistics," 8.

<sup>549</sup> Bronwaterleiding Doorn operates in the municipality Utrechtse Heuvelrug Vewin, "Drinkwaterbedrijven,"

<http://www.vewin.nl/Drinkwater/Drinkwaterbedrijven/Pages/default.aspx>.

<sup>550</sup> Article 1.1 (1), *Wet Van 29 Januari 2009, Houdende Regels Met Betrekking Tot Het Beheer En Gebruik Van Watersystemen* (Water Act).

<sup>551</sup> Article 1.1 (a), *Wet Van 6 April 1957, Houdende Regelen Met Betrekking Tot Het Toezicht Op Waterleidingbedrijven En Tot De Organisatie Van De Openbare Drinkwatervoorziening* (Water Supply Act) The Water Supply Act will be replaced by *Wet Van 18 Juli 2009, Houdende Nieuwe Bepalingen Met Betrekking Tot De Productie En Distributie Van Drinkwater En De Organisatie Van De Openbare Drinkwatervoorziening* (Drinking Water Act).

Ministry of Agriculture, Nature Management and Food Safety<sup>552</sup> regulates water policy in the areas that affect agriculture planning, natural resources (forests, fisheries, rural areas), outdoor recreation, etc. Thus, the national government leads the national policy for water management and water service provision for the country, and can set national standards for water protection, supply and distribution, which need to be implemented and enforced by all other national actors.

## **2.5. Water boards**

Regional water boards are public authorities responsible for regional water management.<sup>553</sup> They have existed since the 13<sup>th</sup> century, and they have the function of managing and maintaining of water barriers and water levels, as well as ensuring provision of wastewater treatment. The water boards receive financial contributions by the national government to finance all water infrastructures such as barriers and waterways, and also by polluters, who have to pay a pollution levy that ensures the provision of water treatment.<sup>554</sup>

The territory of a Water Board generally covers several municipalities and may even include areas situated in two or more provinces. After many changes and modifications in their functions throughout their long history, there are currently 27 water boards in the Netherlands. They are the following:

1. Waterschap Noorderzijlvest;
2. Waterschap Hunze en Aa's;

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<sup>552</sup> Article 1.1(1), *Wet Van 29 Januari 2009, Houdende Regels Met Betrekking Tot Het Beheer En Gebruik Van Watersystemen* (Water Act).

<sup>553</sup> *Wet Van 6 Juni 1991, Houdende Regels Met Betrekking Tot De Waterschappen* (Water Board Act).

<sup>554</sup> Article 3.4, *Wet Van 29 Januari 2009, Houdende Regels Met Betrekking Tot Het Beheer En Gebruik Van Watersystemen* (Water Act).



3. Wetterskip Fryslân;
4. Waterschap Blija Buitendijks;
5. Waterschap Reest en Wieden;
6. Waterschap Velt en Vecht;
7. Waterschap Groot Salland;
8. Waterschap Regge en Dinkel;
9. Waterschap Zuiderzeeland;
10. Hoogheemraadschap Hollands Noorderkwartier;
11. Hoogheemraadschap Amstel, Gooi en Vecht;
12. Hoogheemraadschap De Stichtse Rijnlanden;
13. Waterschap Vallei en Eem;
14. Waterschap Veluwe;
15. Waterschap Rijn en IJssel;
16. Waterschap Rivierenland;
17. Hoogheemraadschap van Rijnland;
18. Hoogheemraadschap van Delfland;
19. Hoogheemraadschap van Schieland en de Krimpenerwaard);
20. Waterschap Hollandse Delta;
21. Waterschap Zeeuwse Eilanden;
22. Waterschap Zeeuws-Vlaanderen;
23. Waterschap Brabantse Delta;
24. Waterschap Aa en Maas;
25. Waterschap De Dommel;
26. Waterschap Peel en Maasvallei;
27. Waterschap Roer en Overmaas. The last two of these are managed by a regional grouping called Waterschapsbedrijf Limburg.

All Water Boards are organised in an Assembly, an Executive Assembly and a Chairperson. The Assembly gathers together representative of categories of stakeholders who have been elected every four years amongst candidates per stakeholder categories,<sup>555</sup> and deliberate and regulate on all water board competences. The Executive Assembly is made up by delegates of the Assembly and the Chairperson. They are in charge of the daily matters of the board and policy preparation. The Chairperson is appointed by the Ministries. The Chairperson presides meetings of the Water Board, is accountable to the Assembly. In cases of urgent need, the Chair can legislate and take measures that are in normal circumstances given to the Assemblies. All Water Boards belong to the Association of Water Boards ("Unie van Waterschappen"), which promotes the interests of Dutch water boards at a national and international level.<sup>556</sup>

## 2.6. Consumers

Along with the principal actors for the provision of water services, a description of the Dutch institutional setting needs to pay attention to the role of consumers. All consumers in the Netherlands are represented by "**Consumentenbond**", a national organisation that has competences on advocacy and defence of consumers' interests.<sup>557</sup> With over 550,000 members, it is the biggest organization of consumers in Europe. Another smaller

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<sup>555</sup> Article 12 *Wet Van 6 Juni 1991, Houdende Regels Met Betrekking Tot De Waterschappen* (Water Board Act). It defines the categories of stakeholders: owners of real estate of open land; owners of real estate consisting of buildings; users of business buildings; representatives of the residents and representatives of tenants.

<sup>556</sup> Herman Havekes et al., "Water Governance: The Dutch Water Board Model," (The Hague: Dutch Association of Water Boards, no year).

<sup>557</sup> See Consumentenbond, "Consumer Association Webpage," <http://www.consumentenbond.nl>.

association “**Vereniging voor Energie, Milieu en Water**” (VEMW) promotes consumers’ and business’ interests with regard to drinking water. Consumers are also served by “**Consuwijzer**,” which is a government department which provides information and advice to consumers.<sup>558</sup>

### 3. LEGAL FRAMEWORK

Although the Dutch Constitution does not mention water management and provision as an obligation, articles 21 and 22 of the text refer to the duty of the public authorities to ensuring the protection and improvement of the environment, as well as the promotion of public health.<sup>559</sup> In compliance with this responsibility, the Dutch Parliament has adopted several legal texts for water resources management and water services provision, which have developed into a complex body of legislation. During the 2000s, strong efforts have been made to integrate and reduce the number of legal text regulating water provision.

The 29 January 2009 Water Act is a key legal text for water resources management in the Netherlands.<sup>560</sup> The Water Act is a framework act, which integrates eight different water management statutes,<sup>561</sup> and defines the

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<sup>558</sup> See ConsuWijzer, “Wat Is Consuwijzer?,” [http://www.consuwijzer.nl/Overige\\_pagina\\_s/Over\\_ons](http://www.consuwijzer.nl/Overige_pagina_s/Over_ons).

<sup>559</sup> Article 21 and 22, *Grondwet Voor Het Koninkrijk Der Nederlanden Van 24 Augustus 1815* (Dutch Constitution). In force in 12 September 1840, Dutch Bulletin of Acts and Decrees 1840, 54.

<sup>560</sup> *Wet Van 29 Januari 2009, Houdende Regels Met Betrekking Tot Het Beheer En Gebruik Van Watersystemen*

<sup>561</sup> The Water Management Act (*Wet op de waterhuishouding*); the Surface Waters Pollution Act (*Wet verontreiniging oppervlaktewateren*); the Marine Waters Pollution Act (*Wet verontreiniging zeewater*); the Groundwater Act (*Grondwaterwet*); the Act of 14 July 1904 containing provisions on land reclamation and construction of dikes (*Wet droogmakerijen en indijkingen*); the Flood Defences Act (*Wet op de waterkering*); the Public Works Management

instruments to plan water resources uses in the Netherlands, including the National Plan for state managed waters,<sup>562</sup> the provincial policy plan on water<sup>563</sup> and the Water Boards' water management plan.<sup>564</sup> With these plans, drafted every 6 years, the different authorities have to evaluate the policy needs and prepare a programme of measures to realise the policy for each of their jurisdictions.<sup>565</sup> By doing so, the Act aims to enhance the link between water management and spatial planning/ spatial environmental policy.<sup>566</sup>

As for water services provision, two key legal texts are the *Water Supply Act*<sup>567</sup> of 1957 and the *Water Supply Amendment Act* of 2004. The *Water Supply Act* is the basic legal text that distributes the responsibilities for water supply amongst public authorities, as well as the rights and responsibilities of water consumers. In addition, the *Water Supply Decree* of 1960 introduces the technical details and provisions, such as the regularity and characteristics of test to control drinking water quality, measures to address failures on minimum quality standards, etc.<sup>568</sup> For its part, the 2004 *Water Supply*

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Act (sections relating to waterways) (*Wet beheer rijkswaterstaatswerken, de 'natte' delen daarvan*); the Public Works Act 1900 (sections relating to waterways) (*Waterstaatswet 1900, het 'natte' gedeelte ervan*).

<sup>562</sup> Article 4.1, 4.2 and 4.3, *Wet Van 29 Januari 2009, Houdende Regels Met Betrekking Tot Het Beheer En Gebruik Van Watersystemen*

<sup>563</sup> Article 4.4 and 4.5, *Ibid.*.

<sup>564</sup> Article 4.6 and 4.7, *Ibid.*

<sup>565</sup> Article 4.8, *Ibid.*

<sup>566</sup> The Water Act has been further developed by the *Wet Van 9 November 2009 Tot Intrekking Van Enige Wetten Betreffende Het Waterbeheer, Aanpassing Van Een Aantal Andere Wetten, Regeling Van Het Overgangsrecht En Aanvulling Van De Waterwet, Met Het Oog Op De Invoering Van Die Wet (Invoeringswet Waterwet)*.

<sup>567</sup> *Wet Van 6 April 1957, Houdende Regelen Met Betrekking Tot Het Toezicht Op Waterleidingbedrijven En Tot De Organisatie Van De Openbare Drinkwatervoorziening* (*Water Supply Act*)

<sup>568</sup> *Besluit Van 7 Juni 1960, Houdende Technische, Hygiënische, Geneeskundige En Administratieve Uitvoeringsmaatregelen Van De Waterleidingwet*. (*Water Supply Decree 1960*)

*Amendment Act* complements the 1957 text by outlawing privatization of the water supply companies – not sewerage or waste water treatment. Only the State, Province or Water Board can be stakeholders of the water companies.<sup>569</sup> The 2004 text states that, given the strategic relevance of water for the country, the state reserved for itself full competences on its management and distribution.<sup>570</sup>

It is important to point out that the 1957 and the 2004 legal texts will be replaced by the *Drinking Water Act* of 18 July 2009, once this act is adopted by means of a Royal Decree – not yet in force.<sup>571</sup> A new *Drinking Water Decree* is also currently being drafted to replace the 1960 *Water Supply Decree*.<sup>572</sup> This text reviews the quality standards of the drinking water, and introduces obligations on the water providers to produce information on water quality and to inform water consumers about it.

#### 4. PRICE SETTING AND SERVICE QUALITY STANDARDS PROCEDURE

The consumers' water bill is made up of three elements defined by three different authorities: the water companies charge a price for the drinking water supplied,<sup>573</sup> the water boards charge a tax for wastewater treatment,<sup>574</sup> and the

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<sup>569</sup> Article 3j (1) (a) *Wet Van 6 April 1957, Houdende Regelen Met Betrekking Tot Het Toezicht Op Waterleidingbedrijven En Tot De Organisatie Van De Openbare Drinkwatervoorziening* (Water Supply Act)

<sup>570</sup> Article 3j (1) (a) *Ibid.*

<sup>571</sup> Art 65 and Art 67, *Wet Van 18 Juli 2009, Houdende Nieuwe Bepalingen Met Betrekking Tot De Productie En Distributie Van Drinkwater En De Organisatie Van De Openbare Drinkwatervoorziening* (Drinking Water Act).

<sup>572</sup> *Ontwerpbesluit Houdende Regels Inzake De Productie En Distributie Van Drinkwater En De Organisatie Van De Openbare Drinkwatervoorziening* (Drinkwaterbesluit)

<sup>573</sup> Article 3p (3), *Wet Van 6 April 1957, Houdende Regelen Met Betrekking Tot Het Toezicht Op Waterleidingbedrijven En Tot De Organisatie Van De Openbare Drinkwatervoorziening* (Water Supply Act)

municipalities impose a sewerage tax for the construction and maintenance of the sewers.<sup>575</sup> Thus, consumers pay different prices depending on the charges imposed by these three different actors operating in their respective jurisdictions, and the volume of water that they consume.

No law defines the process required for setting water price and water standards, which are therefore the responsibility of the different drinking water companies.<sup>576</sup> The sole conditions are established in the *Water Supply Act*, which states that water supply companies have to use reasonable, transparent and non-discriminatory terms and conditions,<sup>577</sup> and in the *Drinking Water Act*, which stipulates that the power to approve the tariffs and conditions rests solely with the General Board of a water company.<sup>578</sup>

Despite this absence of legislation, there are certain voluntary guidelines that water companies have adopted for the setting of water prices. Such is the case of the “Dutch corporate governance code”, elaborated by Corporate

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<sup>574</sup> Article 110 and Chapter XVIIb, *Wet Van 6 Juni 1991, Houdende Regels Met Betrekking Tot De Waterschappen (Water Board Act)*.

<sup>575</sup> Article 228a, *Wet Van 14 Februari 1992, Houdende Nieuwe Bepalingen Met Betrekking Tot Gemeenten*, Ministry of Transport and Public Works et al., “Water Handbook 2004-2005,” (The Hague: Ministry of Transport and Public Works, 2004).

<sup>576</sup> With the exception of drinking water standards, currently defined in Chapter III of the Drinking Water Act establishing the national standards for drinking water quality, in agreement with EU standards, See *Wet Van 18 Juli 2009, Houdende Nieuwe Bepalingen Met Betrekking Tot De Productie En Distributie Van Drinkwater En De Organisatie Van De Openbare Drinkwatervoorziening (Drinking Water Act)*.

<sup>577</sup> Article 3p (3) *Wet Van 6 April 1957, Houdende Regelen Met Betrekking Tot Het Toezicht Op Waterleidingbedrijven En Tot De Organisatie Van De Openbare Drinkwatervoorziening (Water Supply Act)*

<sup>578</sup> Article 20 *Wet Van 18 Juli 2009, Houdende Nieuwe Bepalingen Met Betrekking Tot De Productie En Distributie Van Drinkwater En De Organisatie Van De Openbare Drinkwatervoorziening (Drinking Water Act)*.

Governance Committee of the national government in 2003.<sup>579</sup> Water companies such as Vitens have manifested their acceptance of the code, and have assumed its content.<sup>580</sup> The “Dutch Corporate Governance Code” establishes principles of performance and recommendations for best practice for the adhering companies, such as rules for reporting and supervision of decisions.

## 5. WATER GOVERNANCE IN THE NETHERLANDS

### 5.1. Access to information

The Dutch regulatory framework has provided the highest protection to the right to access to information for consumers. The Dutch Constitution includes transparency as one of the main principles of the action of government, and urges the Parliament to elaborate a legal text to prescribe how government bodies should observe this principle.<sup>581</sup> In 1978, the Parliament enacted the first *Information Act*, which in 1991 was substituted for the one currently in force – the *Government Information Act 1991*<sup>582</sup>. This text establishes the conditions and limits for citizens to access public information.

The *Government Information Act* creates a duty to provide information when requested by a citizen. In the water sector, this duty includes information regarding environmental water status, infrastructure plans, taxes and expenditure concerning water services. The Act introduces certain limitations

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<sup>579</sup> Monitoring Commissie, “Dutch Corporate Governance Code,” (Den Haag: Monitoring Commissie, 2003).

<sup>580</sup> Vitens, “Vitens Annual Report 2009,” (Utrecht 2009), 44.

<sup>581</sup> Art 110, *Grondwet Voor Het Koninkrijk Der Nederlanden Van 24 Augustus 1815* (Dutch Constitution).

<sup>582</sup> *Wet Van 31 Oktober 1991, Houdende Regelen Betreffende De Openbaarheid Van Bestuur* (Government Information Act).

for information disclosure, such as the cases when doing so may endanger the unity of the Crown or damage the security of the state. Further limitations also apply to cases when the information may include or refer to personal data, to criminal investigations, to administrative inspections, and to economic or financial interest of the State.<sup>583</sup> In all these cases, the public authorities should abstain from disclosing the information, in favour to a prevalent right to confidentiality.

If citizens consider that their right to access to information has been breached, they have the right to appeal. The mechanisms to address this matter are no different from other means employed to challenge an administrative decision – which are analysed in section 5.3 further below. As no separate supervisory body exists for overseeing the implementation of freedom of information legislation, the same administrative and judiciary mechanisms apply for cases concerning freedom of information disputes.

The application of the *Government Information Act* is restricted exclusively to public authorities, which include the national government, the administrative authorities of the provinces and the municipal bodies, as well as the water boards.<sup>584</sup> Thus, the duty to inform does not apply to water companies, which are not considered public authorities but private actors, even though their shareholders are public entities. In this sense, the Dutch regulatory framework does not provide for the right to access to information that water companies keep.

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<sup>583</sup> Art 10 Ibid.

<sup>584</sup> Art 1a(1) Ibid.



However, since 1997, the Association of Dutch Water Companies (VEWIN) has collected and publicised information on the activities of the Dutch water companies, with the aim to provide public information on the performance of water companies and make their performance more transparent by allowing comparisons between the activities of the suppliers. Prior to 1997, this information was only used internally. Since 1997, the results of this exercise have been published every 3 years - in 1997, 2000, 2003 and 2006 - and distributed widely.<sup>585</sup> In addition, water companies currently offer information about their activities to consumers in Annual report and their websites.<sup>586</sup> By doing so, the water companies meet the recommendations highlighted in the Dutch corporate governance code, which establishes as a good practice to provide information to citizens and shareholders.<sup>587</sup>

The information that VEWIN and water companies collect and publish is to the discretion of the water companies. Information usually refers to the activities carried out, financial information and other aspects such as drinking water quality. In all cases, information is provided free of charge, and tends to be easy to understand. By examining the data, one can observe, for instance, the differences in prices charged to consumers by the different water companies – abstraction, transport, treatment, etc. The information given does not say, however, about the particular conditions that make the water service more

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<sup>585</sup> See Vewin webpage at Vewin, "Water in Zicht: Bedrijfsvergelijking in De Drinkwatersector," Vewin, <http://www.vewin.nl/publicaties/Benchmark/Pages/default.aspx>.

<sup>586</sup> Such is the case of Oasen, "Jaarverslag," <http://www.oasen.nl/klant/Pages/Default.aspx>. Also, Dunea, "Welkom Bij De Klantenservice Van Dunea," <http://www.dunea.nl/renderer.do/clearState/true/menuId/59708/returnPage/59706>. Water Bedrijf Groningen, "Water Bedrijf Groningen - Home," <http://www.waterbedrijfgroningen.nl/nl/water-thuis/klantenservice/pages/default.aspx>.

<sup>587</sup> See part IV.3 Monitoring Commissie, "Dutch Corporate Governance Code."

expensive in one place than in another. It exclusively lists the reasons that may explain these differences between water companies. In addition, as national experts consulted have pointed out, the information provided does not refer to plans of the water companies, which does not help to signal either likely tariff increases or future improvements in the service.

Whereas the publication of information has been voluntary until now, the recently adopted *Drinking Water Act* of 2009 provides a legal obligation to benchmark the activities of the water companies. This requirement, which is not yet in force, will make compulsory to produce and publish comparable information on the activities of the drinking water companies.<sup>588</sup> In this case, therefore, the actual practice of information disclosure has preceded the legal obligation to do so.

## 5.2. Public Participation

No national law exists to define how water consumers need to be involved in the setting of water prices and water standards. The mechanisms for participation to set water tariffs vary, depending on the internal rules of each water company. In all cases, water consumers participate indirectly in the setting of water prices and standards, via local and regional political representatives. Municipal and regional representatives sit in the executive boards of the water companies, and therefore have a say and vote on all decisions concerning water service provision, including service quality and tariffs.

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<sup>588</sup> Art 39, *Wet Van 18 Juli 2009, Houdende Nieuwe Bepalingen Met Betrekking Tot De Productie En Distributie Van Drinkwater En De Organisatie Van De Openbare Drinkwatervoorziening (Drinking Water Act)*.

Some national experts have pointed, however, that municipal stakeholders participate in the decision-making process only formally and that, in practice, the management of the water companies has the final saying on water tariffs and standards. National experts have also warned against the assumption that local political representatives consistently voice consumers' concerns, as this may not be the case. Local stakeholders may be also inclined to serve other interests, (e.g. the financial gains or viability of the water company) which may not be directly related to defending consumers' interests.<sup>589</sup>

As for direct public participation, the Netherlands has only developed guidance for water companies, in the shape of the "Dutch Corporate Governance Code". The code recommends signatories – such as VEWIN - to encourage "fully-fledged participation" with stakeholders "in so far as possible".<sup>590</sup> It maintains, furthermore, that stakeholders' participation should be able of exerting influence on the system of "checks and balances" of the company. In certain instances water consumers have had direct representation at the company level. Such as the case of the company Dunea, which has created a consumer council whereby water consumers can provide direct advice on consumer issues to the company management board. The adoption of such consumer councils is voluntary for the company.<sup>591</sup> No legal provision makes direct participation a requirement.

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<sup>589</sup> Interviewee 8

<sup>590</sup> See part IV.1 Monitoring Commissie, "Dutch Corporate Governance Code."

<sup>591</sup> For more information (in Dutch) on Dunea's Consumers Board, see Dunea, "Verbruikersraad," <http://www.dunea.nl/renderer.do/menuId/60691/returnPage/59756>.

Thus, concerning direct public participation, the role of the consumers in water policy making is considerably limited. National experts consulted have said that water in the Netherlands is an uncontroversial sector, as water is of high quality and not expensive. This situation explains why the consumer associations have not been strongly proactive in the water sector. Industrial consumers, on the other hand, have had a more active role in public debate on water issues, as have kept a more active lobbying role to press for lower tariffs for large water consumers.

### 5.3. Access to justice

The Netherlands has developed both administrative and judicial mechanisms to address decisions concerning water prices and service quality. Their aim is to offer protection to citizens against potentially unlawful decisions. Different legal norms apply to decisions taken by public authorities and by private entities. All decisions taken by local, regional and national governments, and water boards public authorities are considered administrative acts. The drinking water companies, however, are not considered administrative authorities: the fact that regions and municipalities are the companies' shareholders does not make them qualify as administrative authorities. The mechanisms to redress drinking water companies' decisions are therefore different to those available for administrative decisions.

Concerning administrative decisions, the *General Administrative Law Act* ("Algemene wet bestuursrecht")<sup>592</sup> is the text that regulates both the making of these decisions and their review. Consumers who disagree on the decisions by

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<sup>592</sup> *Wet Van 4 Juni 1992, Houdende Algemene Regels Van Bestuursrecht (General Administrative Law Act).*

municipalities, regions or water boards, can carry out different activities: (1) to initiate an “objection”, (2) to lodge an administrative appeal, (3) to complain to the Ombudsman or/and (4) to appeal to a judicial court.

Objections are internal procedures lodged with the same administrative authority that has taken the recurred decision.<sup>593</sup> They can be initiated the next day to the publication of the decision, and during a period of 6 weeks<sup>594</sup>. The administrative authority in charge of the objection needs to give interested parties the opportunity to express their views regarding the case,<sup>595</sup> unless the objection is manifestly inadmissible or ill-founded.<sup>596</sup> If admissible, the administrative authority may decide to repeal the order and, if necessary, make a new order to replace it.<sup>597</sup>

In addition, consumers may also lodge an *administratief beroep* (administrative appeal).<sup>598</sup> This is a procedure available only if the law on which the primary decision is based specifically provides for it. An administrative appeal involves a demand for the involvement of a higher-ranking administrative body, which reviews the decision taken by the administration. As with the objections, the appeal can be initiated at any point during the six weeks that follow the decision. The reviewing administrative body may choose to quash the disputed order, or if necessary, may decide to make a new order replacing it<sup>599</sup>.

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<sup>593</sup> Section 1:5, Ibid.

<sup>594</sup> Section 6:7, Ibid.

<sup>595</sup> Section 7:2, Ibid.

<sup>596</sup> Section 7:3, Ibid.

<sup>597</sup> Section 7:11, Ibid.

<sup>598</sup> Article 1:5, *Wet Van 4 Juni 1992, Houdende Algemene Regels Van Bestuursrecht (General Administrative Law Act)*.

<sup>599</sup> Section 7:24, Ibid.

Externally to the administration, any member of the public dissatisfied with the treatment received by local, regional, water boards and national governments, can contact with the *Nationale Ombudsman* (National Ombudsman) up to one year after an administrative decision is taken, to file a complaint.<sup>600</sup> The role of the *Nationale Ombudsman* is to give individuals an opportunity to place complaints about the practices of government before an independent and expert body.

The Dutch Constitution and national law have defined the responsibilities and duties of the *Nationale Ombudsman*<sup>601</sup>. The Ombudsman has authority to investigate actions by 'administrative authorities'- i.e. government bodies.<sup>602</sup> S/He can launch a detailed investigation to gather all details of the case, which may include interviews and data collection. With this information, the Ombudsman analyses whether the public administration has proceeded according to a set of principles for the actions of government.<sup>603</sup> The investigation ends with the publication of a report outlining the characteristics of the dispute case and the resolution that the Ombudsman proposes.

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<sup>600</sup> Section 9:24, *Wet Van 4 Februari 1981, Houdende Instelling Van Het Ambt Van Nationale Ombudsman En Wijziging Van Een Aantal Wetten (National Ombudsman Act)*. See De Nationale Ombudsman, "The Institution - Introduction," <http://www.nationaleombudsman.nl/index.asp>.

<sup>601</sup> Article 78a *Grondwet Voor Het Koninkrijk Der Nederlanden Van 24 Augustus 1815 (Dutch Constitution)*. *Wet Van 4 Februari 1981, Houdende Instelling Van Het Ambt Van Nationale Ombudsman En Wijziging Van Een Aantal Wetten (National Ombudsman Act)*.

<sup>602</sup> As defined in Article 1:1, *Wet Van 4 Juni 1992, Houdende Algemene Regels Van Bestuursrecht (General Administrative Law Act)*.

<sup>603</sup> Section 9:27, subsection 1, *Ibid*.

It is important to note that the Ombudsman's decisions are not legally enforceable. However, given the quality of the investigation carried out, the conclusions of the Ombudsman are considered to have great authority. The administrative authority subjected to the Ombudsman's investigation needs to decide what action, if any, should be taken. Experience shows that the relevant authorities tend to follow the recommendations outlined in the Ombudsman's reports.<sup>604</sup>

Finally, citizens can ask for a review of the administrative decisions in court. Unlike in France or Spain, no special administrative court of first instance exists in the Netherlands. Regular courts have an administrative "chamber" which specializes in administrative appeals. Appeals to administrative cases can be subsequently referred to specialized courts. Depending on the matter, the appeal will be heard by an economic administrative court, a social security and public service court, a tax law court or a court for all other administrative law cases. Appeals to the decisions of these courts are dealt with in the judicial section of the *Raad van State*, or Council of State.<sup>605</sup>

Thus, courts have competence to invalidate an administrative decision. In the water sector, courts are competent to hear cases involving alleged failures in service provision by water companies- for instance, in cases of unlawful

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<sup>604</sup> De Nationale Ombudsman, "The Institution," [http://www.ombudsman.nl/english/ombudsman/the\\_institution/quality-of-government.asp](http://www.ombudsman.nl/english/ombudsman/the_institution/quality-of-government.asp).

<sup>605</sup> Article 8:9, *Wet Van 4 Juni 1992, Houdende Algemene Regels Van Bestuursrecht* (General Administrative Law Act). The Council of the State is a consultative body to the government. It is constituted by members of the royal family and Crown-appointed members generally having political, commercial, diplomatic, or military experience. The Council of State must be consulted by government on proposed legislation before submitting the law to the Dutch Parliament.

disconnection from the water network. The court has to determine if the decision was made according to the principle of legality, and can nullify the decision if it is found to be unlawful. In cases when the decision is annulled on procedural grounds, the court may refer the case back to the administrative body that took the recurred decision, which will have produce another decision. Alternatively, the court itself has powers to make a new order that will replace the one annulled.<sup>606</sup>

A registry fee is levied on the person initiating a court appeal.<sup>607</sup> Legal aid is available for those unable to pay the costs of administrative court proceedings, following income and capital tests to evaluate whether this is the case.<sup>608</sup>

Access to justice for decisions taken by the drinking water companies follows different courses of action, as their decisions are not administrative acts. To redress these decisions, the Netherlands has established *De Geschillencommissie* (or Arbitration Board), which is a foundation with responsibilities to deal with complaints about companies providing public services, and to promote consumers interests.<sup>609</sup> The Arbitration Board is accredited by the Dutch government, which guarantees an impartial and good procedure.

The Arbitration Boards consist out of 9 members: 3 members represent the consumer organisations; 3 members represent the industry; 3 independent

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<sup>606</sup> Section 7:25, Ibid.

<sup>607</sup> Section 8:41, Ibid.

<sup>608</sup> Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, "Administrative Justice in Europe - Report for the Netherlands," (2009), [http://www.juradmin.eu/en/eurtour/eurtour\\_en.lasso?page=detail&countryid=19](http://www.juradmin.eu/en/eurtour/eurtour_en.lasso?page=detail&countryid=19).

<sup>609</sup> For information on Arbitration, see De Geschillencommissie, "De Geschillencommissie - Home," <http://www.degeschillencommissie.nl/index.html?cat=1>.



members nominated by the Minister of Justice. The Arbitration Board splits into different Complaint Boards for the different industry sectors. Each Complaint Board consists out of 3 members: the president, a member nominated by the Consumers Association, a member nominate by the involved industry sector. The Complaint Board for cases concerning drinking water companies is called *Geschillencommissie Energie en Water* (Complaint Board Energy and Water).

If a consumer wishes to submit a dispute to the Arbitration Board, they have to fill in a query sheet (available also online). In it, the consumer explains the reason of his/her complaint, and may also propose solutions. In this sense, appeals to the Arbitration Board are simpler and less time consuming than a lawsuit: communication between the Board and the consumer is easier to understand, and the presence of a lawyer, albeit permitted, is not compulsory. Nonetheless, procedures at the Arbitration boards are not free of charge. A fee range from €25 to €125 (depending on the complaints board) has to be paid, and the proceeding only starts once the fee is waged.

The Arbitration Boards' pronouncements are legally binding for both parties, and they end the dispute. Higher appeal is not possible at the Arbitration Board. Once the sentence is passed, any of the parts may appeal it in court within 2 months – the procedure followed is the same as for reviews of administrative acts. Hence, a court may invalidate the Arbitration decision if it considers that it does not comply with the standards of reasonableness and fairness. If no submission at a regular court is made within 2 month, the Complaints Board's decision becomes irreversible.

In this sense, the Arbitration Board can be considered as a simpler, quicker and less expensive alternative to going to court – without actually forgoing the possibility of an appeal to court. The Dutch system for access to justice is revealed, for these reasons, the most comprehensive of the cases analysed in the present report.

## **6. CONCLUSIONS**

The Netherlands has developed a distinctive model for provision of water supply and sewerage services, which includes various relevant authorities and responsible bodies: local authorities, provinces, water boards and drinking water supply companies all participate in the provision of water services.

This regulatory model has relied on developing strong mechanisms for access information and access to justice. Regarding access to information, public authorities and water companies have publicised large amounts of information, resulting either from legal mandates or from voluntary actions to introduce transparency to their activities. As for access to justice, the Dutch legal framework contains provisions to facilitate the review of all decisions internally within the administration, by judicial courts, by the National Ombudsman or by the Arbitration Boards. Consumers have at their disposal ways to ensure that all decisions may be subject to reassessment and modification.

Participation by consumers in the decision-making process has been, however, rather limited. Consumers have had reduced opportunities to introduce their preferences into the decision making process for setting prices and standards of service. The Dutch regulatory system has until now confided the

representation of consumers' interests to political representatives that decide on the water tariffs, taxes and service quality from either local authorities, provinces and water boards, or as shareholders of the drinking water companies.

## **CHAPTER 8. SCOTLAND**

### **1. INTRODUCTION**

Scotland is a country rich in water resources. With a population over 5 million, Scotland has approximately 100,000 km of rivers, 150 lochs and 12,000 km of coastline for a population over 5 million. Water provision in Scotland covers 130,000 business customers and 2.2 million household customers, 70% situated in the central belt that runs from northeast to southwest from Dundee to Glasgow. Water consumption is currently at around 143 litres/person/day.

Scotland follows a model of Delegated-Public Management. Drinking water and sewerage services are provided by one public company, Scottish Water, which operates within the limits imposed by an independent economic regulator, the Water Industry Commission for Scotland (WICS) and the Scottish Government. The Drinking Water Quality Regulator for Scotland and the Scottish Environmental Protection Agency (SEPA) have functions as water quality and environmental standards setters. Consumers are organised in a water consumers association, WaterWatch, which represents all Scottish water users.

Water price and service standards setting in Scotland follows a “regulatory agency approach”, by which Scottish Water operates within the price limits and according to the standards set by the national government and the regulators – the WICS, SEPA and the Drinking Water Quality Regulator. The mechanisms to set water price limits and service standards have rested, as this chapter shows, on ensuring access to information and regulatory transparency.

Water consumers have been allowed to participate via consultation procedure in the regulatory process to decide on prices and standards. Access to justice has relied on administrative procedures to review the regulators' decisions, and an attempt to minimise the number of cases reviewed in court.

Demographic data	
<b>Total population</b>	5 million
<b>Urban population (%)</b> <sup>610</sup>	68%
<b>Number of households</b>	2.2 million

Natural resources data	
<b>Water availability per person per year</b>	2,392 m <sup>3</sup> /person/year <sup>611</sup>
<b>Average water use per person per day</b>	143 litres/day <sup>612</sup>
<b>Average water bill</b>	£324/year <sup>613</sup>

Allocation of roles between public authorities	
<b>Responsible body for drinking and waste water provision</b>	Scottish Government
<b>Other relevant authorities</b>	Scottish Government for laws and regulations
	Environment Agency for water resources management

Management models for water utilities	
<b>Types of operators active in the country</b>	Publicly owned water company: Scottish Water
<b>Infrastructure ownership</b>	Public authorities
<b>Forms of public-private partnership</b>	N/A

## 2. INSTITUTIONAL FRAMEWORK

The core institutions for water and sewerage service provision in Scotland are the Scottish Executive, Scottish Water and the Water Industry Commission for

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<sup>610</sup> Percentage of those living in large urban areas and "other urban areas, according to Scottish Government, "Social Focus on Urban Rural Scotland 2003,"(2003), <http://www.scotland.gov.uk/Publications/2003/05/17207/22176>

<sup>611</sup> Data for the UK, Food and Agriculture Organization of the United Nations, "Aquastat."

<sup>612</sup> Scottish Water, "Household Charges,"

[http://www.scottishwater.co.uk/portal/page/portal/SWE\\_PGP\\_HOUSEHOLD/SWE\\_PGE\\_HOUSEHOLD/SWE\\_HH\\_CHRG/Household%20Charges%2009-10](http://www.scottishwater.co.uk/portal/page/portal/SWE_PGP_HOUSEHOLD/SWE_PGE_HOUSEHOLD/SWE_HH_CHRG/Household%20Charges%2009-10).

<sup>613</sup> Ibid.

Scotland. There is a functional division of responsibilities between these bodies, as each carries out a distinct task.

**2.1. Scottish Government** is the main responsible for setting the objectives for the water industry. This includes a wide array of topics, such as pollution control and water management, drinking water quality, reservoir safety, marine and freshwater quality, sewage treatment and water conservation. The Scottish government leads in the development of policy strategies for the country, and is also in charge of transposing and applying EU legislation.<sup>614</sup>

**2.2. Scottish Water** is the water utility that provides water and sewerage services. Created by the Water Industry (Scotland) Act 2002, Scottish Water is a “public corporation of a trading nature”<sup>615</sup>, owned by the government of Scotland and answerable to the Scottish Parliament. The Water Industry (Scotland) Act 2002 gave duties and powers to Scottish Water. It establishes that the company relies entirely on customer bills for its income turnover, and operates within price limits set by the economic regulator.<sup>616</sup>

**2.3. Water Industry Commission for Scotland (WICS)** is a non-departmental public body with statutory responsibilities for the economic regulation of the Scottish water industry.<sup>617</sup> The Commission is made up by

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<sup>614</sup> See Scottish Executive Water Services Division, "Investing in Water Services 2006-2014," (Edinburgh: Scottish Executive, 2005).

<sup>615</sup> Article 20 and Schedule 3 *Water Industry (Scotland) Act 2002*. See also Scottish Executive Water Services Division, "Managing Change in the Water Industry: A Consultation Paper," (Edinburgh: Scottish Executive, 2000).

<sup>616</sup> Article 29, *Water Industry (Scotland) Act*. See also David W Tagg, "Case Study of Scottish Water," (Delft: UNESCO-IHE, 2003).

<sup>617</sup> Part 1 and Schedule 1 of the *Water Services Etc (Scotland) Act 2005*.

five members: a Chairman and four other non-executive members, including WICS's Chief executive. It was established in 2005, taking over the responsibility for regulation of water and sewerage services from the former Water Industry Commissioner for Scotland.<sup>618</sup> As economic regulator, the WICS has the task of setting prices that are consistent with Ministers' principles of charges and water industry objectives. WICS's mission is "to manage an effective regulatory framework which encourages the Scottish water industry to provide a high-quality service and value for money to customers".<sup>619</sup> It does so by monitoring and benchmarking the activity of Scottish Water with that of water companies in England and Wales. Aspects such as the companies' capital investment schemes and expected operational efficiency gains are analysed to ensure that, albeit in absence of market competition, Scottish Water does not abuse its monopolistic position.<sup>620</sup>

Other two Scottish regulators have a say in the running of water service. The **Drinking Water Quality Regulator for Scotland** has the mandate to protect public health and ensure that supplied water complies with the drinking water quality regulations. The Drinking water Quality Regulator has powers to acquire information, conduct investigations and take enforcement action should this prove necessary.<sup>621</sup> Besides, the Regulator routinely audits Scottish Water's laboratories and water treatment works. With these audits, the

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<sup>618</sup> *Water Industry Act 1999*.

<sup>619</sup> Water Industry Commission for Scotland, "Water Industry Commission for Scotland," Water Industry Commission for Scotland.

<sup>620</sup> Water Industry Commission for Scotland, "Information Note 7: Customer Service: Overall Performance Assessment (Opa)," <http://www.watercommission.co.uk/UserFiles/Documents/Updated%20Public%20Information%20Note%20OPA.pdf>.

<sup>621</sup> Section 7 *Water Industry (Scotland) Act 2002*.

Regulator ensures that Scottish Water is complying with the requirements for water quality defined by law.<sup>622</sup> For its part, the **Scottish Environment Protection Agency** is Scotland's environmental regulator and adviser, responsible to the Scottish Parliament through Ministers.<sup>623</sup> SEPA aims to provide an efficient and integrated environmental protection system for Scotland; a system that will both improve the environment and help deliver the Scottish Government's overall purpose.

Along with those institutions, water users also have a say in the running of the water sector. **WaterWatch** is the national complaints handling authority for all domestic and non-domestic water customers and consumer representative body for the water industry in Scotland.<sup>624</sup> In 2005, WaterWatch substituted five Water Customer Consultation panels, created in 2002 under the Water Industry (Scotland) Act 2002. However, and perhaps confusedly, the legislation has not been modified to reflect the change of names from Water Customer Consultation Panels to WaterWatch, so no legal document reflect this change in the main Scottish water consumer association. Since then, WaterWatch represents formally consumers' interests. It is in charge of voicing consumers' preferences about water price and quality of service. WaterWatch has a national remit. Its role is to investigate complaints made by water customers, represent customers, influence policy and inform and to advise customers in all matters related to water and sewerage provision. WaterWatch is headed by the Convener, who is appointed by the Scottish Ministers,

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<sup>622</sup> In particular, the *Water Supply (Water Quality)(Scotland) Regulations 2001*

<sup>623</sup> Created by chapter 2, *Environment Act 1995*.

<sup>624</sup> Established by means of the *Water Services Etc (Scotland) Act 2005*.



initially for a period of three years. The Convener is subsequently in charge of appointing the members of WaterWatch also for a period of three years.<sup>625</sup>

### 3. LEGAL FRAMEWORK FOR WATER AND SEWERAGE SERVICES

The Scottish legal and institutional framework for the water industry has undergone important changes in the last twenty years. Whereas in 1989 England and Wales privatised its water sector, Scotland decided to maintain the industry in public hands. From 1975 to 1996, nine Scottish Regional Councils were responsible for the provision of water and waste water services. In 1996, the Regional Councils merged into three water authorities: East of Scotland Water, North of Scotland Water and West of Scotland Water, with the purpose of benefiting from economies of scale and actually removing water provision responsibilities from local authorities.<sup>626</sup> The process of industry integration continued with the merge in 2002 of the three companies into one single company named Scottish Water, which would provide water and sewerage services for the whole of Scotland.<sup>627</sup>

Two regulations currently make the core legal framework for water provision and sewerage services in Scotland. These norms formally create the institutions

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<sup>625</sup>For general information on the activities of WaterWatch, see WaterWatch Scotland, "Waterwatch Scotland Website Homepage," <http://www.waterwatchscotland.org/>. For the legal text outlining the powers and responsibilities of WaterWatch, see Schedule 2, *Water Industry (Scotland) Act 2002*.

<sup>626</sup>Themselves established under the *Local Government (Scotland) Act 1994* C.39.

<sup>627</sup>By means of the *Water Industry (Scotland) Act 2002*. See Sarah Marjorie Hendry, "Scotland's Water - Safe, Clean, Affordable, Public?," *Natural Resources Journal* 43 (2003). Sarah Marjorie Hendry, "Water for Sale? Market Liberalisation and Public Sector Regulation in Scottish Water Services," *Utilities Law review* 16, no. 4 (2008).

in charge of providing and regulating the Scottish water sector, and define their main competences.<sup>628</sup>

The *Water Industry (Scotland) Act 2002* established Scottish Water as a publicly owned company responsible for providing water and sewerage services to all Scottish customers, modifying all references to previous competent authorities for water supply and sewerage provisions. The Act sets how Scottish Water should operate: it establishes Scottish Water's obligation to develop a code of practice and defines the characteristics of the mechanisms for charging customers for their services.<sup>629</sup> This legal norm also created the Water Industry Commissioner and the Customer Panels, which were in charge of "representing the views and interests of the customers of Scottish Water"<sup>630</sup>. Nevertheless, subsequent legislation from 2006 modified the structure and competences of the Water Industry Commissioner and the Customer Panels and gave more weight to the economic regulation of the industry and to customers' representation.

The *Water Services etc. (Scotland) Act 2005* introduced changes to the regulatory framework of 2002. The Act strengthened the economic regulation of the Scottish water service industry by setting up the Water Industry Commission, which substituted the Water Industry Commissioner. A group, rather than a sole individual, would be responsible for economic regulation of the industry from then on. Furthermore, the Act made provisions regarding competition in the water industry, by allowing to the establishment of a retail licensee as a

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<sup>628</sup> See Sarah Marjorie Hendry, "An Analytical Framework for Reform of National Water Law" (University of Dundee, 2008). Thesis unpublished.

<sup>629</sup> Part 3, *Water Industry (Scotland) Act 2002*.

<sup>630</sup> Art 2.3, *Ibid*.

subsidiary of Scottish Water. This way, Scottish Water itself retained all the statutory functions of water and sewerage undertaker, but the service could be provided by a private licensed company. Finally, this legal text also strengthened customer representation by giving further powers to Customers Panels (which became WaterWatch) to investigate complaints and participate in consultations.

Other legislation, notably the *Water Environment and Water Services (Scotland) Act 2003* (WEWS) has had a very large impact on the management of the Scottish water resources –which has had indirectly affected the costs of providing water services. The WEWS has implemented the Water Framework Directive in Scotland, which has included provisions for the achievement of water environmental objectives and the management of river basins. Whereas the legislation has knock-on effects in the costs of water resources (as it ensures a better quality of the water abstracted, and therefore arguably a less costs in drinking water treatment) it does not make direct provision for water price and service standards.

#### 4. TARIFF AND SERVICE STANDARDS SETTING PROCEDURE

Scotland follows a “regulatory agency approach”<sup>631</sup> to set up water tariff and the service standards for all Scottish water users. This means that the water tariff is defined by Scottish Water, within the limits established by a third party, the WICS.

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<sup>631</sup> The World Bank and PPIAF, "Approaches to Private Participation in Water Services: A Toolkit." (Washington: The International Bank for Reconstruction and Development; the World Bank, 2006), [http://rru.worldbank.org/Documents/Toolkits/Water/Water\\_Full.pdf](http://rru.worldbank.org/Documents/Toolkits/Water/Water_Full.pdf).

The water services tariff in Scotland is composed of four elements: a) the supply of drinking water; b) the removal and treatment of sewage; c) the removal and treatment of drainage of private areas such as roofs and car parks (known as surface drainage), and d) the removal and treatment of drainage from public areas such as roads. Disposal of trade effluent through the sewerage system by non-domestic customers is paid for separately. Since 1996, local authorities bill and collect household water and sewerage charges on behalf of Scottish Water, together with Council Tax. This joint billing and collection system enables water and sewerage bills for domestic properties to be linked to the Council Tax banding system. The level of the tariff depends on the council tax band that each house is rated in: water customers occupying lower banded properties pay a lower charge for water and sewerage services. The vast majority of households in Scotland are billed for their water and sewerage services in this manner, with a lower percentage paying for their water services on a measured or metered basis.<sup>632</sup>

The process to determine the maximum charges customers pay is called the Strategic Review of Charges, and takes place every 5 years. The Strategic Review of Charges entails the analysis of operating and capital costs required to run the industry.<sup>633</sup> To set up the price caps for customer bills, water companies, WICS, the Scottish Government and other stakeholders engage in a process that develops in various stages.<sup>634</sup>

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<sup>632</sup> The legal norm that makes provision for link between the billing and collection of water charges with Council Tax *Water Services Charges (Billing and Collection) (Scotland) Order 2006*.

<sup>633</sup> See for instance Water Industry Commission for Scotland, "Cost and Performance Report 2006-07," (Stirling: Water Industry Commission for Scotland, 2007).

<sup>634</sup> See Water Industry Commission for Scotland, "Information Note 12: Price Setting: The Strategic Review of Charges," Water Industry Commission for Scotland,

First, the Scottish Government sets the objectives for the industry. It publishes a document setting series of principles that should underpin the way customers are charged and the timescale over which price limits must be established and the final deadline by which the review must be finished. This document may also include other objectives for the industry such as environmental protection, quality of service standards, impact on vulnerable groups, etc. The objectives and principles are opened for consultation amongst water stakeholders.<sup>635</sup>

Secondly, Scottish Water plans how to meet these objectives. It considers how much funding it will be needed to achieve these objectives, and set outs its requirements in a Draft Business Plan. This plan details how Scottish Water will deliver the Cabinet Secretary's objectives. Scottish Water submits its business plans to the WICS. Subsequently, the WICS scrutinises Scottish Water's proposals to determine whether they represent value for money for customers. At this stage, the WICS asks the Drinking Water Quality Regulator (DWQR) and the Scottish Environment Protection Agency (SEPA) for assistance on water quality objectives and on environmental standards. The WICS then converts Scottish Water's funding requirements into annual limits on the prices it can charge customers over the review period.

Finally, the WICS consults the decision. With this aim, it first publishes a draft determination of charges. This decision is sent to stakeholders such as WaterWatch, inviting them to offer their views, and to Government, which can

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<http://www.watercommissioner.co.uk/UserFiles/Documents/WICS%20Info%20note%202012.pdf>.

<sup>635</sup> See, instance, Water Industry Commission for Scotland, "Our Approach to the 2010-2014 Price Review: A Consultation," (Stirling: Water Industry Commission for Scotland, 2006).

revise the objectives in the light of the impact on prices, before issuing a final legal direction. WICS are required to collect all opinions before publishing a final determination of charges for the following five years.

## 5. WATER GOVERNANCE IN SCOTLAND

The three elements that constitute the core of water governance in water services provision in Scotland are analysed below. Each section sums up the main aspects of the discussion in a table that gathers the criteria discussed in Chapter 2.

### 5.1. Access to information

Access to information in Scotland is regulated in two texts: *The Freedom of Information (Scotland) Act 2002* and the *Environmental Information (Scotland) Regulations 2004*. The Freedom of Information (Scotland) Act 2002 requires all Scottish public authorities to be proactive in providing and publishing information to the public, and in habilitating mechanisms for citizens to exercise their rights to receive information about the activities of public authorities. The Environmental Information (Scotland) Regulations 2004 complement the Freedom of Information Act, and deal particularly with the provision of environmental information, ensuring that Scotland complies with the Aarhus Convention.

In exercise of the duties of the Information acts, the WICS, the Scottish Executive and Scottish Water provide access to key information on the regulatory process. The WICS has adopted a scheme where it sets out its policy for the publication of information, indicating what data is to be made

available, its costs and, if applicable, its price.<sup>636</sup> Press Notices, Board Meeting Agendas & Minutes, Annual Performance Reports of Scottish Water, regulatory exchange letters between Scottish Water and the WICS, output monitoring reports, etc. are available to the public free of charge.<sup>637</sup>

Both the Scottish Executive and Scottish Water have made strong efforts to facilitate understanding of their competences on water services regulation. Their websites, information notes and regular updates provide clear information on their activities and the relationship that they keep with other relevant authorities and regulators. They are easily accessible and mostly free documents – most on them available online.<sup>638</sup> Ministers also publish their views on quality and price objectives and the methodology for tariff setting process for openness and transparency.

In addition, for each Strategic Review of Charges, the WICS publishes a document with a detailed explanation of the methodology for the price review. This document explains the procedures to set both price and customer standards. In this sense, water stakeholders can get information on the procedure that the regulator is going to employ to set water prices. Moreover, the WICS disseminates information on Scottish Water's Annual Return and

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<sup>636</sup> Water Industry Commission for Scotland, "Publication Scheme. Freedom of Information (Scotland) Act 2002," Water Industry Commission for Scotland, <http://www.watercommission.co.uk/UserFiles/Documents/Publication%20Scheme%20v2%20-%20110707%20ready%20for%20submission.pdf>.

<sup>637</sup> See Water Industry Commission for Scotland, "Publications," [http://www.watercommission.co.uk/view\\_Publications\\_Main.aspx](http://www.watercommission.co.uk/view_Publications_Main.aspx).

<sup>638</sup> See for instance Scottish Water, "Find out About Us," [http://www.scottishwater.co.uk/portal/page/portal/SWE\\_PGP\\_ABOUT\\_US/SWE\\_PGE\\_ABOUT\\_US](http://www.scottishwater.co.uk/portal/page/portal/SWE_PGP_ABOUT_US/SWE_PGE_ABOUT_US). Also, Scottish Government, "Water in Scotland," <http://www.scotland.gov.uk/Topics/Environment/Water>.

Scottish Water's Performance via periodic reports.<sup>639</sup> These reports elaborate from the raw data provided by Scottish Water on customer service, investment performance and cost performance reports. Thanks to their homogeneous format, it is possible to establish meaningful comparisons from one year to another on the activities carried out by the regulator and by Scottish Water.

The legislation makes compulsory for the WICS to publish its decisions, but not of the reasons behind them.<sup>640</sup> Despite this, the final decision on charge limits and customer standards has been usually accompanied with an outline of the Regulators' conclusions and their responses to issues raised during the consultation process.

Access to information is usually free. Exceptions to this general rule apply when the costs of providing the information exceed an amount prescribed by the Scottish Executive.<sup>641</sup> However, consumers bear the cost of the information they require through tariffs: in Scotland, a fraction of the monies collected by bills are destined to cover the expenses incurred by the economic regulator.

Information is restricted in certain cases. The legal framework provides a number of absolute and public interest exemptions, which entails the right to reserve information away from the public.<sup>642</sup> Thus, Scottish public authorities can lawfully withhold information in cases when its disclosure may affect the

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<sup>639</sup> See Water Industry Commission for Scotland, "Scottish Water's Performance," [http://www.watercommission.co.uk/view\\_Scottish\\_Waters\\_Performance.aspx](http://www.watercommission.co.uk/view_Scottish_Waters_Performance.aspx) Scottish, Water Industry Commission for Scotland, "Annual Reports," [http://www.watercommission.co.uk/view\\_Annual\\_reports.aspx](http://www.watercommission.co.uk/view_Annual_reports.aspx).

<sup>640</sup> Art 29B (4), *Water Services Etc (Scotland) Act 2005*.

<sup>641</sup> Articles 12-13, *Freedom of Information (Scotland) Act 2002*.

<sup>642</sup> Part II, *Ibid*.



privacy of particulars or seriously prejudice the commercial interests of any person or organisation. Thus, to withhold information, public authorities need to show that releasing information would be damaging effect. In these cases, the public authorities (be it Scottish Executive, the WICS or Scottish Water) is obliged to indicate why the information is being withheld. Where an exemption exists, it may be possible to provide copies with the exempted information edited out.<sup>643</sup>

However, if consumers do not find the decision satisfactory, they can ask, first, for a review of the decision to the Scottish public authority. The Freedom of Information (Scotland) Act 2002 establishes the conditions that public authorities need to ensure to facilitate a review of information refusal.<sup>644</sup> These conditions include the format and content for the requirement for review of refusal, as well as the characteristics of the response given by the Scottish public authorities, such time and format of the response.

Furthermore, if they are dissatisfied with the way that a Scottish public authority has responded to a demand for information, they can appeal to the Scottish Information Commissioner.<sup>645</sup> The Scottish Information Commissioner was established by statute to enforce and promote Scotland's freedom of information laws. The Commissioner handles complaints, investigates the case, examines the evidence and the reasons given by the authorities to withhold information, and decides whether the authority's decision complied with legal requirements. His/her decisions are legally binding; the Commissioner has

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<sup>643</sup> Article 35 Ibid. See also exception under regulation 10(5)(b) *The Environmental Information (Scotland) Regulations 2004*.

<sup>644</sup> Articles 20 and 21, *Freedom of Information (Scotland) Act 2002*.

<sup>645</sup> Article 47, Ibid.

powers to enforce decisions, which may entail the disclosing of previously withheld information, or to support and justify the right of the public authority to refuse the publication of the requested information.

## **5.2. Public participation**

Consumers can participate in consultations by Scottish Water, by the Scottish Government and by WICS. Scottish Water consults customers on direct and concrete management topics that may affect water users (infrastructure building, tariff increases within the price cap, etc). The Scottish Government initiates consultations on wider topics of policy goals and objectives, whereas the WICS does the same when deciding on price tariff setting.

As for Scottish Water's consultations, the regulatory framework makes explicit reference to the duty to involve the public in the process of setting water prices and customer service standards. The Water Services (Scotland) Act 2005 creates the obligation to involve water stakeholders via consultation. It establishes that Scottish Water has the obligation to develop a consultation code, which is submitted and approved by Scottish Ministers. WaterWatch has the right to be consulted about the content of this code.<sup>646</sup>

The Scottish Water's Code identifies the topics of consultation, the people consulted, the main characteristics of the consultation procedures and the methods employed. In agreement with the consultation code, a list of "interested parties" is drafted for the consultations. This list includes WaterWatch Scotland as representatives of the interests and views of

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<sup>646</sup> Article 28, *Water Industry (Scotland) Act 2002*.

consumers, along with individual customers, local authorities, community groups, industry stakeholders, etc. All matters related to infrastructure development, including debates on priorities, impact and planning of operations, are necessarily topics of consultation. Crucially, customers are also consulted about both domestic and business water and waste water charges schemes and standards of service and the code of practice.

Interested parties are called to participate in consultation procedures, which, need to be open for a minimum of 12 weeks. The regulator has collected information according to a set of questions directed to consumers, although consumers may use the opportunity to raise concerns that the regulator has not addressed. Scottish Water has to give feedback to all responses and has to indicate how they have influenced the final outcome. Finally, the responses given to Scottish Water consultation exercises are commonly made public, excepting when individuals or organisations have expressly requested confidentiality.<sup>647</sup>

From its part, the WICS initiates wide public consultation every five years, on occasion of the strategic review of prices. As explained above, the WICS consults other water stakeholders at one main instances of the tariff setting process: the regulator sends a draft of their determination of charges to water stakeholders such as WaterWatch, inviting them to offer their views prior to the final decision. It is important to point that, whereas consumer's participation has been guaranteed in the regulatory process, the regulator is not legally

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<sup>647</sup> See Scottish Water, "Consultation Code," Scottish Water, [http://www.scottishwater.co.uk/portal/page/portal/SWE\\_PGP\\_HOUSEHOLD/SWE\\_PGE\\_HOUSEHOLD/SWE\\_PGE\\_HH\\_1\\_OURCOM/SWE\\_HH\\_OURCOM\\_1\\_CONCDE/SW%20Consultation%20Code%20Lo-Res.pdf](http://www.scottishwater.co.uk/portal/page/portal/SWE_PGP_HOUSEHOLD/SWE_PGE_HOUSEHOLD/SWE_PGE_HH_1_OURCOM/SWE_HH_OURCOM_1_CONCDE/SW%20Consultation%20Code%20Lo-Res.pdf).

obliged to consider or include their concerns. Thus, consumers' preferences may not necessarily be included in the final decisions by the regulator.<sup>648</sup>

Finally, the Scottish Government initiates consultations in a wide array of issues and considers them as "an essential and important aspect of Scottish Government working methods".<sup>649</sup> To ensure consistency in the consultation exercises, the Scottish Government has issued a Consultation Good Practice Guidance<sup>650</sup>, which instructs on how to carry out a consultations exercise and provides advice to all government's departments conducting consultation. The Guidance includes instructions on the steps to take to initiate a consultation, and standards that need to be complied with, such as the requirement of giving stakeholders a minimum of 12 weeks since the publication of the consultation and of ensuring publication and dissemination of stakeholders' responses.

Concerning water regulation, the Scottish Executive consults about environmental and consumer standards that will subsequently be required to the water companies. Scottish Government's consultations, in this case, contribute to inform the development of a particular policy by canvassing the preferences and opinions of those who will be directly affected by it. Recent closed contributions have included the topics of implementing the Water Environment and Water Services (Scotland) Act 2003, the standards and

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<sup>648</sup> Article 29B (4), *Water Services Etc (Scotland) Act 2005*.

<sup>649</sup> Scottish Government, "About Scottish Government Consultations," Scottish Government, <http://www.scotland.gov.uk/Consultations/About>.

<sup>650</sup> Scottish Government, "Scottish Government: Consultation Good Practice Guidance," Scottish Government, <http://www.scotland.gov.uk/Resource/Doc/160377/0079069.pdf>.

conditions of water and sewerage infrastructure<sup>651</sup> and the principles informing the consumers' charges.<sup>652</sup>

As for the WICS, in no case is the Scottish Government bound to meet the concerns raised by water stakeholders, but it takes their contributions to inform its decision. The contributions from all consulted parties are placed in the Scottish Government library – unless they request confidentiality. Furthermore, documents are commonly published on the Government webpage with the responses from different stakeholders to each of the sections of the consultation and the views made by WICS.

### **5.3. Access to justice**

Access to justice in Scotland has many similarities with England. Scotland has favoured internal non-judiciary procedures to redress regulatory decisions, rather than court mechanisms. Thus, a water consumer dissatisfied with decisions regarding water standards and water prices, is invited to appeal first to the organisation that has taken the decision, and to other external bodies only once this procedure has been exhausted.

When water consumers disagree with a decision on water prices and customer service standards, they can initiate different measures to redress the decision. As in England, the law ensures that water consumers in Scotland receive

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<sup>651</sup> Scottish Government, "Implementing the Water Environment and Water Services (Scotland) Act 2003: Water, Sewerage and Drainage Infrastructure: Construction Standards and Vesting Conditions: A Consultation," Scottish Government, <http://www.scotland.gov.uk/Publications/2007/04/05155102/0>.

<sup>652</sup> Scottish Government, "Paying for Water Services 2010-14: A Consultation on the Principles of Charging for Water Services," Scottish Government, <http://www.scotland.gov.uk/Publications/2007/11/22142050/0>.

certain standards of service, thanks to the “Guaranteed Standards Scheme”<sup>653</sup>. Aspects such as quality of service and of water supplied, certain customer requests, unplanned interruptions, etc, are covered by the Scheme.<sup>654</sup> If Scottish Water fails to meet the scheme standards, it will automatically make a payment to the consumers affected.

For any other complaint, Scottish Water has developed a compliance complaint procedure, involving the appointment of a compliance officer who analyses the nature of the consumer’s complaint and decides on the action to take<sup>655</sup>. The Officer may decide to uphold the complaint, propose a remedy for compensation to the consumer and monitor that Scottish Water carries it out, or, alternatively, s/he may decide against the complaint. In this case, the officer needs to inform the complainant of this fact, provide reasons for this decision and indicate the steps that the complainant may take to pursue the matter further.

If the dissatisfaction is with a WICS decision, water consumers can initiate an Internal Complaints Procedures with the WICS. Indeed, water consumers dissatisfied with the way that WICS have handled their concerns or queries, are encouraged to get in touch with the regulator, either personally and directly, or via WaterWatch.<sup>656</sup> Consumers can raise the issue, first, with the Director of Corporate Affairs and Customer Service, who should analyse the case and

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<sup>653</sup> Sections 26-27, *Water Industry (Scotland) Act 2002*.

<sup>654</sup> Scottish Water, "Our Promises to You. Code of Practice," (Edinburgh: Scottish Water).

<sup>655</sup> Scottish Water, "Scottish Water’s Compliance Complaint Procedure," [http://www.scottishwater.co.uk/portal/page/portal/SWE\\_PGP\\_COMMERCIAL/SWE\\_PGE\\_COMMERCIAL/PROD\\_WHOL\\_WEL/WHOL\\_PROD\\_ROLE/Complaints%20process.pdf](http://www.scottishwater.co.uk/portal/page/portal/SWE_PGP_COMMERCIAL/SWE_PGE_COMMERCIAL/PROD_WHOL_WEL/WHOL_PROD_ROLE/Complaints%20process.pdf).

<sup>656</sup> See Water Industry Commission for Scotland, "How to Complain," [http://www.watercommission.co.uk/view\\_Complaints.aspx](http://www.watercommission.co.uk/view_Complaints.aspx).

provide a response within 20 days. If consumers find this response unsatisfactory, they can ask for a review by the WICS Chief Executive, who may correct the decision and, at all times, give an answer to their concerns.

If the point of contention is with the service given by the Scottish Government, the procedure involves, first, to raise the issue with the officials of the department that the complaint is about. If this appeal fails to give a satisfactory answer to the consumers, they are entitled to refer the case to a "Complaints Officer", who is a senior official particularly appointed to look into the complaint and provide help to resolve it. After this, if the complaint is still not resolved, the consumer can ask for the issue to be reviewed by the relevant Director within the Executive.<sup>657</sup> The Scottish Government has issued guidance on how to complaint.<sup>658</sup>

As for external mechanisms to redress regulatory decisions, they can be initiated against decisions by Scottish Water, by WICS, and by the Scottish Government.

Regarding decisions by Scottish Water, consumers may refer the issue to WaterWatch in first instance. WaterWatch initiates an investigation on the matter after the consumer has attempted to resolve it with the water supplier - or an unreasonable length of time expires since the consumer raised the complaint. WaterWatch collects all information about the dispute from the consumer and the water company, and intermediates by proposing solutions

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<sup>657</sup> See Scottish Government, "The Scottish Government Complaints Procedure," <http://www.scotland.gov.uk/About/Contacts/Have-Your-Say/Making-Complaints>.

<sup>658</sup> Scottish Government, "How to Complain to the Scottish Government: Our Standards of Service," <http://www.scotland.gov.uk/Publications/2008/06/11133639/1>.

they consider appropriate.<sup>659</sup> WaterWatch has developed some standards of service to the consumers, which guide and benchmark their performance.<sup>660</sup>

When consumers disagree with a decision on water tariff taken by the WICS, they may ask for a review of the decision by the Scottish Executive, via WaterWatch, in representation of consumers' interests. After analysing their concerns, the Scottish Executive may decide review the decision. However, WaterWatch can only question the procedure carried out to set prices and water service standards, but not ministerial objectives. Thus, it is not possible to appeal a decision that been published by WICS and accepted by Scottish Executive if it has met adequately all formal controls all the different stages of the Price Review.<sup>661</sup> In this sense, consumers have different powers to the water companies regarding requests for a review of a decision. Unlike consumers, to water companies, Scottish Water can ask the Competition Commission to intervene if it continues to disagree with a decision by the WICS on the water price caps<sup>662</sup>. As explained above in the chapter on England, the Competition Commission is an independent public body established by the Competition Act 1998. Amongst its powers are to conduct inquiries into mergers and the regulation of major regulated industries, and to decide on final price limits for all utilities in the UK. Although no specialist courts for regulatory matters exist in either Scotland or England, the Competition Commission has enforcement powers to modify price cuts. Thus, the Competition Commission can side with

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<sup>659</sup> WaterWatch Scotland, "Our Investigation Process,"

<http://www.waterwatchscotland.org/complaints/what-happens-next/>.

<sup>660</sup> WaterWatch Scotland, "Our Service Standards,"

<http://www.waterwatchscotland.org/complaints/our-service-standards/>.

<sup>661</sup> Art 32. *Water Industry (Scotland) Act 2002*.

<sup>662</sup> *Competition Act 1998*.



the decision of the WICS and the Scottish Government, or repeal a decision and set price caps higher or lower than established.

For their part, if consumers consider that Scottish Waters, the Scottish Executive or the WICS have neglected their duties as water operators and regulators, they can refer to Scottish Public Services Ombudsman, which was set up in 2002 to investigate complaints made against organisations that provide public services in Scotland.<sup>663</sup> The Scottish Public Services Ombudsman is an individual appointed by Her Majesty on the nomination of the Scottish Parliament. If an investigation finds deficient administration or provision service, the Ombudsman can issue recommendations to redress the problem. Although their decisions are not binding, the Ombudsman exerts strong monitoring pressure to make the organisation adopt the recommendations. In this context, if the Ombudsman identifies that the recommendations are not put into place, they can lay a Special Report before the Parliament highlighting their concerns. Parliament would then be responsible of deciding what to do.<sup>664</sup>

Finally, as in England, judicial review is reserved to extraordinary cases, WaterWatch and independent consumers can appeal for a judicial review. First, they have to prove that they have a title and interest in order to be able to sue. Even then, they are entitled to judicial review in the following circumstances: breach of duty, exceeds powers, format irregularity or done something unreasonable and irrational (Common Law, built on cases).<sup>665</sup> Similar conditions

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<sup>663</sup> *Scottish Public Services Ombudsman Act 2002*.

<sup>664</sup>Section 15, *Ibid.* Scottish Public Services Ombudsman, "Report to Parliament," <http://www.spso.org.uk/our-process/reporting/report-parliament>.

<sup>665</sup> Tom Mullen, "Administrative Justice in Scotland – the Way Forward," (Consumer Focus - Scotland, 2009), Association of the Councils of State and Supreme Administrative

regarding court fees and legal aid apply in Scotland as in England – that is £30 for lodging an application for judicial review, £180 further if the application is granted, and, in cases of permission to appeal, £200 to the court of Appeal. The Legal Services Commission – contributes to covering legal fees of applicants with limited financial resources. The Legal Services Commission has established an income threshold under which applicants for judicial review are granted legal aid.<sup>666</sup>

## 6. CONCLUSIONS

This chapter has analysed water governance in Scotland. It has examined the functions and powers of key national actors responsible for the regulation of water service provision in the country: Scottish Water, and the Scottish Government are directly responsible for providing water supply and sewerage. Along with these actors, the Water Industry Commission for Scotland (WICS), the Drinking Water Quality Regulator for Scotland and the Scottish Environmental Protection Agency (SEPA) have crucial functions as water quality and environmental standards setters. The chapter has also highlighted the role of WaterWatch as the association representing all Scottish water users.

The chapter has shown how the Scottish regulatory framework provides for access to information, public participation and access to justice for consumers. Although different from the English system concerning the industry's ownership, the chapter has found similarities between these two cases in the

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Jurisdictions of the European Union, "Administrative Justice in Europe - Report for the United Kingdom."

<sup>666</sup> See pp 108-109 of the present report, concerning England.

governance of water services provision. In particular, the Scottish regulatory framework relies on providing information to water consumers, and thus documents employed to define the regulatory setting procedure and to inform a regulatory decision are in the public domain. Like in England, the chapter has found that Scottish consumers are allowed to participate via consultation procedures in the regulatory processes to decide on prices and standards. Access to justice has relied on administrative procedures to review the regulators' decisions. As in England, Scotland has favoured administrative mechanisms to address consumers' concerns, and has sought to minimise the number of cases reviewed in court, which deal instead exclusively with highly controversial and disputed cases.

## **CHAPTER 9. SPAIN**

### **1. INTRODUCTION**

This chapter examines governance in water services provision in Spain. As all other chapters before, this chapter analyses first what are the organisations responsible for the provision of water services. It shows that local authorities in Spain are in charge for the provision of drinking water and sewerage to all local residents. They can carry out this task directly or, alternatively, they may choose to delegate it to a public or private water company operating under a contract. Regional and national governments also play a fundamental role as standards setters and ratifiers of water tariffs.

The chapter subsequently analyses the existing procedures to set water prices, and the regulatory provisions for water consumers to access information, to participate in the setting of water prices and quality standards and to access to justice. The analysis shows that national regulatory provisions ensure that water consumers receive information on final decisions reached by the local authorities. Mechanisms also exist at the national level to facilitate water consumers to challenge decisions on water prices and water standards, if they wish. The national regulatory framework, however, provides only for limited participation of water consumers in the decision making process to set water prices and service standards. The degree of public participation varies across the Spanish regions, but consists generally in providing an opinion on the final annual local water tariff agreed by the relevant authorities, with reduced opportunities to participate throughout the price and standards setting processes.

Access to water resources in Spain is highly irregular. Although the average water availability in the country is 2,506 m<sup>3</sup>/capita/year,<sup>667</sup> the distribution of the resource varies pointedly between the wet northern areas and the dry south and eastern regions. During the 20<sup>th</sup> century, the country underwent a vigorous programme of infrastructure building, with the aim of ensuring access to water supply and sewerage to all citizens. Today, around 98% of households – 20.8 million households for around 42 million inhabitants - are connected to the water and sewerage network.<sup>668</sup> Water consumption is one of the highest in the world, with 157 litres/person/day.<sup>669</sup>

Demographic data	
Total population	42.6 million
Urban population (%)	77%
Number of households	20.8 million

Natural resources data	
Water availability per person per year	2,506 litres <sup>670</sup>
Average water use per person per day	157 litres <sup>671</sup>
Average water bill	€227/year <sup>672</sup>

Allocation of roles between public authorities	
Responsible body for drinking and waste	Municipal and supramunicipal level

<sup>667</sup>UNESCO, "Water Availability Per Person Per Year,"

[http://www.unesco.org/bpi/wwdr/WWDR\\_chart1\\_eng.pdf](http://www.unesco.org/bpi/wwdr/WWDR_chart1_eng.pdf).

<sup>668</sup> Instituto Nacional de Estadística, "Los Cambios Sociales De Los Últimos Diez Años," *Cifras INE: Boletín informativo del Instituto Nacional de Estadística* 2/2003 (2003).

<sup>669</sup> Instituto Nacional de Estadística, "Average Household Water Consumption Decreased 2.9% During the Year 2005, Standing at 166 Litres Per Inhabitant Per Day," *Press release*(2007).

<sup>670</sup> Food and Agriculture Organization of the United Nations, "Aquastat."

<sup>671</sup> Instituto Nacional de Estadística, "Encuesta Sobre El Suministro Y Saneamiento Del Agua . Año 2007," <http://www.ine.es/prensa/np561.pdf>.

<sup>672</sup> Organización de Consumidores y Usuarios, "De Los 400 Euros De Murcia a Los 0 Euros De Almusafes," [http://www.ocu.org/derechos-del-consumidor-y-familia/20091104/agua-distinta-calidad-y-distinto-precio-Attach\\_s472434.pdf](http://www.ocu.org/derechos-del-consumidor-y-familia/20091104/agua-distinta-calidad-y-distinto-precio-Attach_s472434.pdf).

<b>water provision</b>	
<b>Other relevant authorities</b>	Ministry of the Environment for laws and regulations
	Nine River Basin Authorities - water resources management in interregional rivers
	17 Autonomous Communities - water resources management in intraregional rivers

<b>Management models for water utilities</b>	
<b>Types of operators active in the country</b>	Direct public management
	Publicly owned entities
	Private operators under PPP contracts
	Private ownership and operations
<b>Infrastructure ownership</b>	Public authorities
	Private operators
<b>Forms of public-private partnership</b>	Lease
	Concession
	Public-private joint ventures

## 2. INSTITUTIONAL FRAMEWORK

Local authorities are the authorities responsible for the provision of water supply and sewerage services in Spain. They are entitled either to provide the service directly, or to delegate it to public or private water operators. For their part, national governments, regional authorities and river basin authorities set environmental and water service standards and approve water price limits. Their functions and duties are analysed below.

### 2.1. Local Authorities

The Local authorities (or *municipios*) are a primary administrative unit in Spain.<sup>673</sup> They are the principal tier of government in charge of water supply and water sewerage services.<sup>674</sup> As such, they are responsible for ensuring the

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<sup>673</sup> Article 137, *Constitucion Espanola*.

<sup>674</sup> Article 25, *Ley 7/1985, De 2 De Abril, Reguladora De Las Bases De Regimen Local*.

running of the service, for planning and for collecting revenues. There are currently around 8,000 local authorities in Spain responsible for the provision, as well as of water and sewerage services, other key services such as waste collection, urban planning, local social services, etc.<sup>675</sup>

The responsibility for the government and administration of the local authorities belong to the *Ayuntamiento* (Council), which is composed of public representatives (*concejales*) elected every four years by the local residents, and a Mayor (*Alcalde*), who represents the Council and directs all local policies.<sup>676</sup>

To carry out their tasks, local authorities are authorised to create supra-municipal entities for cooperation in the supply of local services.<sup>677</sup> All local and supramunicipal entities exercise their functions autonomously, within the limits and according to the minimum standards established by national and regional laws.<sup>678</sup> Thus, regarding water services provision, national laws entitle local authorities to carry out their duties in four alternative manners.<sup>679</sup> First, they can operate water facilities and manage the service directly (*gestión directa*).<sup>680</sup> Secondly, they can designate a financially autonomous agency or a municipality-owned company to do the job (*sociedad privada municipal or provincial*).<sup>681</sup> Alternatively, they can choose to delegate the work to a

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<sup>675</sup> See Ministerio de Política Territorial, "Datos Del Registro De Entidades Locales," [http://www.mpt.es/documentacion/politica\\_local/sistema\\_de\\_informacion\\_local\\_-SIL-/banco\\_de\\_datos/registro\\_eell/datos\\_registro\\_eell.html](http://www.mpt.es/documentacion/politica_local/sistema_de_informacion_local_-SIL-/banco_de_datos/registro_eell/datos_registro_eell.html).

<sup>676</sup> Article 20, *Ley 7/1985, De 2 De Abril, Reguladora De Las Bases De Regimen Local*.

<sup>677</sup> Article 44, *Ibid.*

<sup>678</sup> Article 25 *Ibid.*

<sup>679</sup> Title III, *Decreto De 17 De Junio De 1955, Por El Que Se Aprueba El Reglamento De Servicios De Las Corporaciones Locales*.

<sup>680</sup> Article 41, *Ibid.*

<sup>681</sup> Article 89, *Ibid.*

franchised private company (*concesión*),<sup>682</sup> or, fourthly, they can create a joint venture with private capital (*empresa mixta*).<sup>683</sup> In all cases, ownership of all assets remains within public hands, but the management of the service may be contracted out either to private or public operators. Currently, 42% of the Spanish population are provided with water services by public companies, 40% by private companies, 11% by joint ventures, 6% directly by local authorities, and 1% by other means.<sup>684</sup>

## 2.2. National government

Whilst the local authorities are in charge for providing water supply and sewerage services, they have reduced responsibilities for the management of water resources available in the country. Matters such as pollution control, abstraction, canalisations, etc. are the tasks of the national and the regional governments. Regarding the national government, the Spanish Constitution gives the exclusive legislative powers on water management to this tier of government. As such, the national authority is the principal responsible for the planning and execution of hydrological public works, including infrastructures (dams, canalisations, etc) and the development of a policy to protect and preserve water resources.<sup>685</sup> In this sense, the national government is a key actor for ensuring water availability and protecting water resource in Spain.

The government department traditionally in charge of water resource management has been the Ministry of Public Works, as water management has

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<sup>682</sup> Article 114, Ibid.

<sup>683</sup> Article 102, Ibid.

<sup>684</sup> Ministerio de Medio Ambiente, "Precios Y Costes De Los Servicios Del Agua En España; Informe Integrado De Recuperación De Costes De Los Servicios De Agua En España," (Madrid: Ministerio de Medio Ambiente, 2007), 16.

<sup>685</sup> Article 45 *Constitucion Espanola*.



traditionally been considered as being closely linked to infrastructure building. In 1997, however, the Ministry of the Environment was created, and became the main agency for the management of all the country's water resources. Within the Ministry of the Environment, nine **River Basin Authorities** (RBAs- *Confederaciones Hidrográficas*) carry out the managerial functions for the interregional rivers.<sup>686</sup> The RBAs are public authorities that operate under the responsibility and with grant in aid of the national government.<sup>687</sup> They are in charge of controlling and regulate the level of pollution on the rivers within their basins. As such, they set pollution standards, establish principles for freshwater allocation, develop a system for water pricing for agricultural purposes, assign water rights to users, control water pollution levels, etc. in these rivers.<sup>688</sup> The current RBAs are Norte, Duero, Tajo, Ebro, Júcar, Segura, Guadiana, Guadalquivir, Segura. From 1 January 2006 the management of Guadalquivir or *cuenca atlántica andaluza* has been transferred to the region of Andalucía.<sup>689</sup>

### 2.3. Autonomous communities

The 1978 Spanish Constitution divided state competences territorially between the national government and the Autonomous Communities (*Comunidades Autónomas*) which are new political regions with competences on services provision, such as education, health and land planning.<sup>690</sup> Spain has 17

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<sup>686</sup> Articles 21 and 22, *Real Decreto Legislativo 1/2001, De 20 De Julio, Por El Que Se Aprueba El Texto Refundido De La Ley De Aguas*.

<sup>687</sup> They also have access to their own funding sources by charging for certain activities, such as abstraction, irrigation and pollution, Article 39, *Ibid*.

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<sup>689</sup> Ministerio de Medio Ambiente, "Medio Ambiente En España 2005," (Madrid: Ministerio de Medio Ambiente, 2005), 186.

<sup>690</sup> Articles 143 to 158, *Constitucion Espanola*.

Autonomous Communities: Galicia, Asturias, Cantabria, País Vasco, Catalonia, Valencia, Murcia, Andalucía, Canarias, Baleares, Castilla-la Mancha, Madrid, Castilla-la Mancha, Aragón, Extremadura, la Rioja, and Navarra.

The Autonomous Communities have progressively assumed responsibilities related to environmental water protection.<sup>691</sup> In line with the territorial division of responsibilities for environmental policies in Spain, the regions are in charge of the planning, the monitoring and the enforcement of national and European environmental legislation in the river basins that fall within their territorial borders. In doing so, they are required to comply, and make comply, with the national legislation and minimum national standards - applicable to the whole country.<sup>692</sup> The regional authorities are entitled to build on minimum national standards and carry out their own environmental policies in their territories, but respecting and taking into account the general national regulatory framework. Their activities should improve or complement, but never diminish, the provisions made in EU and national laws.<sup>693</sup>

In addition, regional authorities hold responsibilities for the control of the prices that local authorities set for water services.<sup>694</sup> During the 1980s, they all established **Regional Price Commissions** (*Comisiones Regionales de Precios*), which are in charge of ratifying price increases in local services such as water,

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<sup>691</sup> In line with the provisions of Art 149.1.23, Ibid.

<sup>692</sup> Such as the *Decreto 1471/1989, De 1 De Diciembre, Por El Que Se Aprueba El Reglamento General Para El Desarrollo Y Ejecución De La Ley 22/1988, De 28 De Julio, De Costas, Para Tramitar La Correspondiente Autorización De Vertido Al Mar Desde Tierra, Orden De 13 De Julio De 1993 De Instrucción Para Las Condiciones De Vertido Al Mar Desde Tierra*.

<sup>693</sup> *Sentencia Del Tribunal Constitucional De 4 De Julio De 1991. N.º 149/91. Inconstitucionalidad Y Nulidad De Determinados Preceptos De La Ley 22/88*.

<sup>694</sup> By virtue of the Regional constitutional laws (*Estatutos de Autonomia*).

sewerage and urban transport (taxi, bus and regional train tariffs).<sup>695</sup> Local authorities, therefore, hold no discretionary powers to set prices to the local services they provide, but need to receive approval from regional commissions made up by regional political representatives and members of the regional “civil society”, including consumers’ associations, trade unions, and business representatives.

The different Regional Price Commissions work independently one another. Their functions and powers, as well as their functioning rules and the procedures they follow, vary from region to region, according to regional laws. In any case, their role is restricted at controlling the tariffs set by the local authorities, and cannot propose a different tariff structure or introduce taxation. They have, in this sense, soft powers as price regulators.

**2.4. Consumer associations** also play a role in the institutional framework in Spain, along with the national, the regional and the local governments and the water companies. Consumers can associate in societies to defend their interests as service users.<sup>696</sup> The largest of the consumer associations in Spain are **FACUA**<sup>697</sup>, **Union de Consumidores de España**,<sup>698</sup> and the **Organización de Consumidores y Usuarios**.<sup>699</sup> No association for water consumers only exists in Spain. In addition, at the regional and local level, other associations

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<sup>695</sup> See for instance *Decreto 30/1984, De 27 De Marzo, Por El Que Se Crea La Comisión De Precios De La Comunidad De Madrid*, *Decreto 149/1988, De 28 De Abril, Sobre El Régimen Procedimental De Precios Autorizados*, *Modified by Decreto 164/1993, De 1 De Junio, Por El Que Se Modifica La Estructura De La Comisión De Precios De Cataluña Y Se Establece Su Funcionamiento*, *Modificado Por El Decreto 251/1996, De 5 De Julio*. In different regions, the Regional Price Commission receive slightly different names. For instance, in the region of Murcia it is referred to as “Consejo Asesor Regional de Precios” (Regional Advisory Council on Prices),

may be also present and be representatives of consumers' interests at large. As well as in the Regional Price Commissions, consumers are represented at the Consejo de Consumidores y Usuarios (**National Consumer Council**), which is the national body for consultation and representation of consumers in Spain. National governments have to consult with the National Consumer Council in matters that affect them directly, such as consumers' legislation and taxation.<sup>700</sup>

## 2.5. Water operators

The Spanish regulatory framework has developed general conditions that guide the delegation of service from local authorities to water operators.<sup>701</sup> It establishes the characteristics of the contract of service delegation, and the maximum duration of such contract. Thus, the participation of the water operator in the provision of the service is regulated in bilateral agreements, signed by local councils and the private operators. The national law imposes some requirements on the minimum content that these bilateral agreements need to include. It indicates that the contract need to specify the characteristics of the service contracted, the concession period, which cannot exceed 50 years, the duties on the operator to maintain in good works the assets and infrastructure, the characteristics of the relationship with users, etc.<sup>702</sup> The

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<sup>696</sup> By means of the *Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias*

<sup>697</sup> FACUA, <https://www.facua.org/es/internacional.php>.

<sup>698</sup> Union de consumidores de Espana, <http://www.uniondeconsumidores.info/>.

<sup>699</sup> Organización de Consumidores y Usuarios, <http://www.ocu.org/>.

<sup>700</sup> Art 39 *Real Decreto Legislativo 1/2007, De 16 De Noviembre, Por El Que Se Aprueba El Texto Refundido De La Ley General Para La Defensa De Los Consumidores Y Usuarios Y Otras Leyes Complementarias*.

<sup>701</sup> In particular, in *Ley 30/2007, De 30 De Octubre, De Contratos Del Sector Público*.

<sup>702</sup> Article 115 *Decreto De 17 De Junio De 1955, Por El Que Se Aprueba El Reglamento De Servicios De Las Corporaciones Locales*.

concessionary is obliged to comply with the conditions and requirements set in the contract.

The most important **private water operators** that manage water services in Spain are Grupo Agbar<sup>703</sup>, Aigües de Barcelona<sup>704</sup>, Aguas de Valencia<sup>705</sup>. Amongst the **public water operators**, some of the largest companies are Canal de Isabel II<sup>706</sup>, Aguas de Sevilla<sup>707</sup>, Consorcio de Aguas de Bilbao<sup>708</sup> and Empresa Municipal de Aguas de la Coruna.<sup>709</sup>

### 3. LEGAL FRAMEWORK

The main legislation for water resources management in Spain is the *Real Decreto Legislativo 1/2001, de 20 de julio, por el que se aprueba el texto refundido de la ley de aguas*, which created the national legal framework for water regulation and water uses (abstraction and irrigation).<sup>710</sup> The law declares that water in Spain is public, and makes public authorities responsible for its management. By virtue of this law, regions are in charge for the management of *intraregional* river basins – that is, for rivers whose borders are situated within a regions<sup>711</sup> -

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<sup>703</sup> Grupo Agbar, "Agbar Homepage," <http://www.agbar.es/esp/home.asp>.

<sup>704</sup> Aigües de Barcelona, "Aigües De Barcelona Homepage," <http://www.aiguesdebarcelona.es/esp/index.asp>.

<sup>705</sup> Grupo Aguas de Valencia, "Mas De Un Siglo De Experiencia," <http://www.aguasdevalencia.es/portal/web/Conocenos/index.html>.

<sup>706</sup> Canal Isabel II, "Canal Isabel Ii Webpage," <http://www.cyii.es/cyii.es/web/home.html>.

<sup>707</sup> Empresa Metropolitana de Abastecimiento y Saneamiento de Aguas de Sevilla, "Empresa Metropolitana De Abastecimiento Y Saneamiento De Aguas De Sevilla Home Webpage," <http://www.aguasdesevilla.com/>.

<sup>708</sup> Consorcio de Aguas Bilbao Bizkaia, "Bienvenidos a La Web Del Consorcio De Aguas Bilbao Bizkaia," <https://www.consorcioaguas.com/Web/Inicio/index.aspx>.

<sup>709</sup> Empresa Municipal de Aguas de la Coruna, "Bienvenidos a Emalcsa," <http://www.emalcsa.es/asp/home.asp?opcion=inicio>.

<sup>710</sup> *Real Decreto Legislativo 1/2001, De 20 De Julio, Por El Que Se Aprueba El Texto Refundido De La Ley De Aguas*.

<sup>711</sup> Art 18, Ibid.

while the national government is responsible of interregional river basins, which are river basins that cross the borders of various regions.<sup>712</sup> Responsibilities for water resources management in Spain is therefore divided territorially, with national and regional authorities holding similar functions in different territorial jurisdictions.

Besides the 1985 Water Law, the *Ley de bases de regimen local – LBRL*, (Law 29/1985, law setting the main guidelines for local governing rules), plays a fundamental role in water services provision. The law assigns the responsibility for water provision, sewerage and water treatment to the local authorities.<sup>713</sup> According to the norm, the local authorities are obliged to give these services. A national law, the *Decreto de 17 de junio de 1955, por el que se aprueba el Reglamento de Servicios de las Corporaciones Locales* (Decree on the regulation of local corporation services, 17th June 1955), also regulates minimum standards on the management and the procedures that local authorities need to follow when providing local services.<sup>714</sup>

Subsequent legislation has defined the limits to the exercise of the local competences. Amongst them is the *Real Decreto Legislativo 2/2004, de 5 de marzo, por el que se aprueba el texto refundido de la Ley Reguladora de las Haciendas Locales* (Royal Legislative Decree 2/2004, of 5th March, on the recast of regulatory law of local properties). This text establishes a regime for the determination of “public price” (*precio publico*), which applies to all the services provided by the local authorities, such as water provision. According to this law, public prices

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<sup>712</sup> Art 22, *Ibid.*.

<sup>713</sup> Art 25 *Ley 7/1985, De 2 De Abril, Reguladora De Las Bases De Regimen Local.*

<sup>714</sup> *Decreto De 17 De Junio De 1955, Por El Que Se Aprueba El Reglamento De Servicios De Las Corporaciones Locales.*

need to cover, at least, the costs of providing the service.<sup>715</sup> Exceptions to this rule have been accepted, particularly when other general, social and cultural objectives have been argued to prevail over costs efficiency.<sup>716</sup> Also, the *Real Decreto-ley 7/1996, de 7 de junio, sobre Medidas Urgentes de carácter Fiscal y de Fomento y Liberalización de la Actividad Económica* (Royal Decree-Law 7/1996, of 7<sup>th</sup> June, on urgent fiscal measures for promotion and liberalisation of economic activity) has established general rules to regulate price modification for utilities in Spain. According to this law, price modification has to take into account the evolution of costs in the sector, and other productivity gains.<sup>717</sup> It also distributes competences for price setting between the regional and national level, giving the regional authorities competences for price limits of the water tariff.<sup>718</sup>

Apart from these national laws, the regulation of water service provision is mainly carried out by local authorities. As a locally provided service, bylaws and local conventions may further specify the conditions for access to information for consumers, create opportunities for their participation and develop mechanisms to review decisions.

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<sup>715</sup> Art 44.1, *Decreto Legislativo 2/2004, De 5 De Marzo, Por El Que Se Aprueba El Texto Refundido De La Ley Reguladora De Las Haciendas Locales*.

<sup>716</sup> Art 44.2, *Ibid*.

<sup>717</sup> Art 16, *Real Decreto-Ley 7/1996, De 7 De Junio, Sobre Medidas Urgentes De Carácter Fiscal Y De Fomento Y Liberalización De La Actividad Económica*.

<sup>718</sup> Annex 2, *Ibid*. Along with urban transport, regional trains and irrigation water (for the Canaries). At the national level, utilities such as electricity, gas and telecommunications are subject to price limits established by independent regulatory agencies.

#### 4. PRICE SETTING PROCEDURE

Water and sewerage prices are set at the local level. No legal national procedure exists for price setting in Spain, but each local authority can decide on how to charge consumers for the service they provide. Strong variances exist between Spanish municipalities concerning both the tariffs paid by consumers and the different procedures to set water charges. Only in the region of Catalonia, for instance, up to eight different charging types have been identified in 2004 amongst the over 280 local authorities, depending on the number of increasing water block rates, from 2 to 7.<sup>719</sup> National legislation exclusively requires from local authorities that the water tariff cover, at least, the costs of providing the service.<sup>720</sup> Thus, local authorities need to ensure that the funds collected are sufficient to finance all operating and investment costs incurred in the provision of the service. The water tariff needs to provide the financial resources necessary to provide for the minimum standards by the national and regional governments. Prices paid for water services oscillate sharply across Spain, from up 2,65 euros/m<sup>3</sup> to 0,94 euros/m<sup>3</sup>.<sup>721</sup>

The most common water tariff in Spain has two parts. The first part is a flat charge that reflects fixed costs in water provision and distribution, and sometimes includes environmental taxes such as the sewerage treatment taxes, which some regional authorities have set.<sup>722</sup> The second is a volumetric charge,

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<sup>719</sup> Jordi Roca, Enric Tello, and Emilio Padilla, "Las Estructuras De Los Precios Del Agua Para Consumo Domestico En Cataluna, Desde El Punto De Vista De La Equidad Y El Estimulo Al Ahorro," (1998).

<sup>720</sup> Art 44, *Decreto Legislativo 2/2004, De 5 De Marzo, Por El Que Se Aprueba El Texto Refundido De La Ley Reguladora De Las Haciendas Locales*.

<sup>721</sup> Asociacion Espanola de Abastecimiento de Agua y Saneamiento, "Tarifas De Agua En Espana 2009," (Asociacion Espanola de Abastecimiento de Agua y Saneamiento, 2010).

<sup>722</sup> Such is the case, for instance, of Cataluna, Madrid, Murcia, Galicia, Valencia and Aragon



based on a variable measure of volume of water used by consumers. Water use in Spain is commonly metered, so consumers receive a bill that reflects the amount of water used in a particular period.

Despite this lack of national legislation for defining how to set water prices, two main price setting procedures can, nonetheless, be identified, depending on who provides the service: either the local authority directly or a private company in concession. When the service is provided by the municipality directly, the local department is in charge of estimating and deciding on the tariff that consumers have to pay. The proposed water tariff is subsequently included in the annual local budget, which needs to be approved by the councillors gathered in the local assembly.<sup>723</sup>

In cases when a third party (either a public or a private company) provides the service, the tariffs are established by contract between the local authority and the provider in bipartite negotiation, with no third party involved. The local authority has the power to demand the water provider to give information on the services they offer, and to justify the current tariff and any potential future increases. The proposed tariff agreed by the two parties is, as with direct water provision, included in the local annual budget, which needs to be discussed and approved by the local council.

For instance, in the case of Barcelona, the private water provider (Agbar) takes the initiative by submitting a tariff dossier (*expediente de tarifas*) to the supra-

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<sup>723</sup> Art 122, *Ley 7/1985, De 2 De Abril, Reguladora De Las Bases De Regimen Local*. Also, Articles 42 and 124 of *Decreto De 17 De Junio De 1955, Por El Que Se Aprueba El Reglamento De Servicios De Las Corporaciones Locales*.

municipal body in charge of regulating water and sewerage for Barcelona and its metropolitan area (Entidad de Medio Ambiente de Barcelona-EMA). In the dossier, the company can request an increase in tariffs. The dossier contains detailed information that supports the increase in tariff requested – costs of provision, capital repayments, according to the information that the local authority requests. The EMA can either approve the dossier or decline the approval, or ask for additional or amendment of information to the provider.<sup>724</sup>

Once the local council adopts the tariff, the Regional Price Commissions needs to ratify the price established. Regional Price Commissions are constituted by representatives of the regional government, trade unions, consumers and the industry in each of the 17 Spanish regions. They are set up and regulated by means of regional legislation. Regional Price Commission are in charge of analysing and giving final approval to the increases in prices of local services, such as urban public transport, water and sewerage bills. The Regional Price Commissions have the last word on the authorization of the tariffs in order to be implemented, but they can only ask for a reduction of the tariff proposed, and not an increase.

Local authorities are required to submit reports on the increases of prices for local services to the Commission.<sup>725</sup> In these reports, local authorities need to explain the reasons for the prices set, as well as for any proposed increase in the bill for the local services. The Regional Price Commissions take a case-by-case approach to examine all bill increases. Any modifications are to be duly

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<sup>724</sup> Interviewee 20.

<sup>725</sup> Francisco Gonzalez Gomez, "El Precio Del Agua En Las Ciudades: Reflexiones Y Recomendaciones a Partir De La Directiva 2000/60/Ce," *Ciudad y Territorio* XXXVII, no. 114 (2005).

justified, and based on variations in the costs of production, commercialisation, and/or the characteristics of the service. In this sense, the Regional Price Commission establishes a price cap, but does not act as a regulator of the sector.

## 5. WATER GOVERNANCE IN SPAIN

Variances exist on the mechanisms for access to information, participation in decision-making procedures and accountability in water price setting across Spain. As responsible authorities, local authorities can introduce changes in the procedures to set water prices. For this reason, an analysis of water governance needs to refer to national and regional norms and regulations, as well as to particular local cases. To illustrate the existence of cross-local differences in water governance, this chapter alludes occasionally to the cases of Madrid and Barcelona, which represent two different types of water service management. In the case of Barcelona, the local authority delegates the provision of water services to a private water operator, whereas in Madrid water services are assigned to a publicly owned water company.

### 5.1. Access to information

The general principle of transparency in the activities of public authorities is given constitutional protection in Spain. The Spanish Constitution of 1978 makes provisions to ensure the publicity public authorities' decisions<sup>726</sup> and of judicial actions.<sup>727</sup> It also contains the right of the public to have access to files and administrative records – excepting those that can affect the safety and

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<sup>726</sup> Article 9.3, *Constitucion Espanola*.

<sup>727</sup> Article 120.1, *Ibid*.

defence of the State and the privacy of individuals, within the limits established by law.<sup>728</sup>

Subsequent laws have defined the conditions for access to public information. The most extensive and general treatment of the topic has been provided by the *Ley 30/1992, de 26 de noviembre de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*, which establishes the general right of all citizens to access public archives and registers. The text refers to the limits to the exercise of this right, including the protection of confidential and personal information.<sup>729</sup>

Other legal texts have also regulated access to information either by tier of government or policy sector, and provided a more detailed mechanisms for accessing information. Thus, the *Ley 7/1985, De 2 De Abril, Reguladora De Las Bases De Régimen Local* requires all local authorities to give publicity to their final decisions and make them easily available to the public.<sup>730</sup> This text also establishes that consumers can attend the open meetings of the local authorities<sup>731</sup> - where decisions on water tariffs and services are made – so to receive first hand information on the content of the decisions taken. In addition, local authorities are called upon to make use of information technologies to supply information to citizens and to facilitate their information and, when local authorities consider appropriate, ensure their

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<sup>728</sup> Article 105b, Ibid.

<sup>729</sup> Article 37, *Ley 30/1992 De 26 De Noviembre, De Régimen Jurídico De Las Administraciones Públicas Y Del Procedimiento Administrativo Común, Modificada Por La Ley 4/1999 De 13 De Enero*.

<sup>730</sup> Art 69, *Ley 7/1985, De 2 De Abril, Reguladora De Las Bases De Regimen Local*.

<sup>731</sup> Article 70, Ibid.

participation via consultations.<sup>732</sup> The means and procedures to participate in local affairs are to be established by local authorities to their discretion.<sup>733</sup>

The most common means employed to give diffusion to the decisions have been the publication of information in local and regional governments' institutional websites and Regional official journals.<sup>734</sup> A recent development has been the adoption of an Act regarding the access to public services by electronic means.<sup>735</sup> The legislator has aimed at promoting and increasing the information available online to citizens and public service users,<sup>736</sup> by regulating the conditions to ensure a safe exchange of information<sup>737</sup> and the use of electronic documents and archives.<sup>738</sup>

According to national experts consulted, the information available varies significantly between municipalities. In particular, smaller local authorities have more difficulties to publicise updated information on the water tariffs, whereas bigger local authorities and private concessionaries provide higher quality information. Whereas the information provided varies, it tends to include fixed rates, volume of water used and volumetric charges.<sup>739</sup> However, no reference is made to any duty to publish the reasoning behind a decision, to inform about the procedures followed to set the prices and the consumers'

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<sup>732</sup> Article 70bis, Ibid.

<sup>733</sup> Ibid.

<sup>734</sup> Article 70.2, Ibid.

<sup>735</sup> *Ley 11/2007, De 22 De Junio, De Acceso Electrónico De Los Ciudadanos a Los Servicios Públicos.*

<sup>736</sup> Article 3.4, Ibid.

<sup>737</sup> See articles 13 to 20, Ibid.

<sup>738</sup> See Articles 29 to 32, Ibid.

<sup>739</sup> Interviewee 20.

standards, or the means that local authorities need to use to publicise information.

A recent Act has included requirements on access to information for environmental matters. This is the *Ley 27/2006, de 18 de Julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente* (Law 27/2006, of 18<sup>th</sup> July, on the rights of access to information, public participation and access to justice in environmental issues) transposes two EU directives into national legislation: the Directive 2003/4/EC on public access to environmental information<sup>740</sup> and the Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.<sup>741</sup> This Act makes provisions to comply with the Aarhus Convention, in that it introduces the obligation of the public authorities to issue and provide environmental information – See chapter 3 for an overview on the Aarhus Convention.<sup>742</sup>

By virtue of this text, local authorities, regional and national governments are required to publicise and provide information on water status, environmental impact assessment and about policies and programmes that may have an impact on water quality. The Act also promotes the participation of citizens in

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<sup>740</sup> Directive 2003/4/Ec of the European Parliament and of the Council of 28 January 2003 on Public Access to Environmental Information and Repealing Council Directive 90/313/Eec

<sup>741</sup> Directive 2003/35/Ec of the European Parliament and of the Council of 26 May 2003 Providing for Public Participation in Respect of the Drawing up of Certain Plans and Programmes Relating to the Environment and Amending with Regard to Public Participation and Access to Justice Council Directives 85/337/Eec and 96/61/Ec.

<sup>742</sup> Article 6, *Ley 27/2006, De 18 De Julio, Por La Que Se Regulan Los Derechos De Acceso a La Información, De Participación Pública Y De Acceso a La Justicia En Materia De Medio Ambiente* (Incorpora Las Directivas 2003/4/Ce Y 2003/35/Ce).

environmental policymaking.<sup>743</sup> Public authorities are obliged to involve the public when drafting of policy initiatives with an impact on the environment. Specific mention is given to all policy initiatives and regulations that may affect water resources.<sup>744</sup> The public needs to be consulted and given an explanation on whether and how their concerns have been included in the proposed policy.<sup>745</sup>

Another legal text setting minimum standards for access to information is the *Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el texto refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias* (Royal legislative decree 1/2007, of 16<sup>th</sup> November, on the recast of general law for consumers and users' safeguard and other complementary laws), which brings together, updates and adapts previous national legislation on consumers' rights and duties. Amongst the rights guaranteed in the Act are their right to receive clear information about goods and services<sup>746</sup> and of being consulted in all matters that may affect consumers' interests.<sup>747</sup> The law also ensures the right - not the duty! - of public administrations to publish and make available to consumers results on goods and services provided, with the expressed conformity of companies<sup>748</sup>.

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<sup>743</sup> Article 16, Ibid.

<sup>744</sup> Article 18.1.a, Ibid.

<sup>745</sup> Ibid.

<sup>746</sup> Art 17 *Real Decreto Legislativo 1/2007, De 16 De Noviembre, Por El Que Se Aprueba El Texto Refundido De La Ley General Para La Defensa De Los Consumidores Y Usuarios Y Otras Leyes Complementarias*.

<sup>747</sup> Art 39, Ibid.

<sup>748</sup> Art 44 Ibid.

If a consumer considers that their right to access to information has been breached, the Spanish regulatory framework includes certain provisions to protect this right. The general mechanism to protect the right is established in the *Ley 30/1992 de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común* (Law 30/1992 on public administrations' legal system and on common administrative procedures). This text establishes that any person is entitled to know about the status of any procedures in which they have a stakeholder status at any time. They are also entitled to obtain copies of documents related to these procedures, as well as to obtain information and guidance on legal and technical requirements that the rules imposed on projects, performances or propose to make requests and access to records and archives of the government under certain conditions. The existing legislation for redressing mechanisms for access to information is therefore also limited: the procedure is aimed at facilitating access to existing documents, and not to receive an answer from the relevant authorities.

In addition, with the transposition of EU directives on access to information and public participation, by means of the *Ley 27/2006, de 18 de Julio, por la que se regulan los derechos de acceso a la información, de participación pública y de acceso a la justicia en materia de medio ambiente*, consumers have been given extra right to access to justice if they consider that a public authority has infringed their rights to access to environmental information and public participation.<sup>749</sup> In this sense, this text doubles the legal guarantees for the protection to the right of access to information on environment matters but, unlike in other countries,

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<sup>749</sup> Title IV, *Ley 27/2006, De 18 De Julio, Por La Que Se Regulan Los Derechos De Acceso a La Información, De Participación Pública Y De Acceso a La Justicia En Materia De Medio Ambiente* (Incorpora Las Directivas 2003/4/Ce Y 2003/35/Ce).



no specialised body deals with complaints regarding access to information, but they are referred to the conventional judicial proceedings.

Overall, the Spanish regulatory system has given certain guarantees to consumers to access information on water issues. However, certain concerns have been raised regarding the quality of information available, and the mechanisms to request detailed information from public authorities. In particular, consumer representatives have highlighted that, in absence of common benchmarks on key information on water services provision, it is difficult to compare the services across the numerous and varied Spanish local authorities<sup>750</sup>. With no comparative information on the functioning of water service across municipalities, it has been particularly difficult to use the information available to examine how local authorities fulfil their responsibilities as water providers. National experts consulted have also supported the creation of an independent national regulatory body to control water services in Spain. This institution would establish the parameters that local authorities would have to fulfil, both in terms of the quality of the service they provide and the procedures in decision-making. Such a regulatory body could benchmark the activities carried out by public authorities, and facilitate information to consumers and control to administrations.<sup>751</sup>

More recently, some announcements have been made in the press regarding the possible future adoption of an Access to Information Act.<sup>752</sup> This law would

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<sup>750</sup> Interviewee 11.

<sup>751</sup> Interviewee 15; Interviewee 14.

<sup>752</sup> Europa Press “Las ONG critican la opacidad del Gobierno al redactar la ley de transparencia y piden que se publique su borrador”, 4 June 2010. El País “Administraciones, los datos no les pertenecen”, 31 July 2010

impose a duty on the public authorities not only to facilitate the access to files and records, but also to ensure that questions posed by the public are given a particular answer by the public authorities.<sup>753</sup>

## 5.2. Public participation

The Spanish legal framework does not make requirement at the local level to involve consumers directly in the regulation and management of the water sector. The responsibility for provision of water supply and sewerage belongs to the local authority, which is supposed to channel the interests of consumers through the local political representatives.<sup>754</sup> In certain cases, however, local authorities may decide to give opportunities to consumers to express their opinions, on voluntary basis. In Barcelona, for instance, each time a new water tariff is to be approved, the EMA summons local consumers representing the neighbours' associations (CONFAVC), to inform about their projects, and listen to their opinions and proposals. This consultation process that is not regulated, but has influenced certain regulatory decisions - such as change in tariff structure and a more self-explanatory bill.

At the regional level, consumer interests enjoy more direct representation than at the local level, thanks to the existence of the Regional Price Commissions. Consumer associations participate in the meetings of these Commissions, along with other groups such as environmentalists, trade unions and neighbours associations. Members of the Regional Price Commission are asked

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<sup>753</sup> Fernando Rey Martínez, "El Derecho De Acceso a La Información En España," in *Dilemas de la transparencia: experiencias comparadas* (Oaxaca2008). Gonzalez Gomez, "El Precio Del Agua En Las Ciudades: Reflexiones Y Recomendaciones a Partir De La Directiva 2000/60/Ce," 311-12.

<sup>754</sup> See, for instante, article 1 *Ley 7/1985, De 2 De Abril, Reguladora De Las Bases De Regimen Local*.

to give a vote for the proposed annual water tariff, and for any tariff increases. To be adopted, the proposed bill needs to be agreed by the majority of the participant members.

The make-up of the Regional Price Commissions varies across Autonomous Communities, and thus the weight of consumers' representation is slightly different from region to region. For instance, in the case of Madrid, the Regional Price Commission<sup>755</sup> is made up by 27 members, including a President, a First Vice-president, a Secretary and 24 members.<sup>756</sup> Out of these 27 members, five are representatives of consumers associations, which have to be registered in the region. In Cataluña, the Regional Price Commission is made of 22 members. 2 of these 22 members are representatives of consumer bodies. The rest includes one President, a Vice-president, a Secretary, 13 representatives of different regional departments, and two members representatives of businessmen associations, two of trade unions<sup>757</sup>. Therefore, the influence of consumers in each regional price commission varies across regions. In the cases presented here, consumers' representation is larger in Madrid than in Barcelona.

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<sup>755</sup>Created in 1984 by virtue of the *Decreto 30/1984, De 27 De Marzo, Por El Que Se Crea La Comisión De Precios De La Comunidad De Madrid*. In 2001, it was modified by means of *Decreto 152/2001, De 13 De Septiembre, Del Consejo De Gobierno, Por El Que Se Aprueba El Reglamento De La Ley 11/1998, De 9 De Julio, De Protección De Los Consumidores De La Comunidad De Madrid*

<sup>756</sup> Art 5 *Decreto 152/2001, De 13 De Septiembre, Del Consejo De Gobierno, Por El Que Se Aprueba El Reglamento De La Ley 11/1998, De 9 De Julio, De Protección De Los Consumidores De La Comunidad De Madrid*

<sup>757</sup> Art 2, *Decreto 149/1988, De 28 De Abril, Sobre El Régimen Procedimental De Precios Autorizados, Modified by Decreto 164/1993, De 1 De Junio, Por El Que Se Modifica La Estructura De La Comisión De Precios De Cataluña Y Se Establece Su Funcionamiento, Modificado Por El Decreto 251/1996, De 5 De Julio*.

Despite this formal mechanism for the direct representation of consumers' interests, some interviewees have pointed at the limited role of consumers at the Regional Price Commission. They have stressed that members of the Price Commission do not usually have the knowledge and the resources to control exhaustively the prices and to give informed opinions on whether the prices set by local authorities are appropriate. In this sense, the Regional Price Commissions tend to fulfil a role as formal ratifiers of decisions, with limited powers to oversee the activities and charges of local authorities.<sup>758</sup> In practice, interviewees consider the Commission to fulfil a consultation, not a regulatory, purpose. More particularly, some Commission members have pointed out that they face important limitation as consumer representatives. For instance, they receive the documentation only around a week before the commission is celebrated, which hampers their opportunities to propose initiative or alternatives. In addition, with only a small percentage of the total votes, consumer representatives have limited opportunities to make a difference in the final vote on water prices.

In addition, national experts consulted have highlighted the reduced interest of consumers to participate in Regional Price Commissions and, more generally, in water regulation. In their view, this disinterest is due to the limited knowledge of consumers of their rights to participate<sup>759</sup>, but also in a broad trust in how the service is provided.<sup>760</sup> In any case, according to the national experts interviewed, other recent national legislation for water resources management can be expected to influence the way in which the

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<sup>758</sup> Interviewee 19; Interviewee 13

<sup>759</sup> Interviewee 14; Interviewee 15.

<sup>760</sup> Interviewee 17; Interviewee 18; Interviewee 19.

sector is regulated, even though it does not directly refer to mechanisms for water services provision. In particular, with the adoption of the Water Framework Directive (WFD), there is a growing awareness of the need to involve consumers in water resources management. The Jucar River Basin, for instance, has been an early adopter of the Directive as it became one of the WFD pilot river basins, and mechanisms to involve farmers, NGOs and consumer associations are being put in place. The extent to which these norms can create a spillover effect on the provision of water services is still to be seen.

### **5.3. Access to justice**

When water consumers are unhappy with the services that the Spanish local authorities provide (either directly or via concession), they have different alternatives to ask for amendments, depending on the type of problem arising.

If consumers identify a deficient performance by a water operator, they can address the particular provider. Water operators are obliged by national law to comply with its contractual duties<sup>761</sup>, so they need to correct any deficit in the service provision. No national provision exist on the measures they have to facilitate, so it belongs to the private company to decide what measures, if any, to put in place to address consumers' complaints. Given that diverse concessionaries provide the service under different conditions agreed with the local authority, the procedures to raise a complaint may also vary. A comprehensive analysis of the existing mechanisms requires the analysis of all local bylaws – beyond the scope of this report. Nonetheless, in a randomly

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<sup>761</sup> Article 128, *Decreto De 17 De Junio De 1955, Por El Que Se Aprueba El Reglamento De Servicios De Las Corporaciones Locales*.

selected number of local authorities (Barcelona<sup>762</sup>, Medina del Campo<sup>763</sup>, Huesca<sup>764</sup> and Madrid), consumers are most commonly invited to complain to the water provider via email or telephone. In these cases, the water provider usually employs a case-by-case approach to analyse the particular case and the consequences of the complaint. In certain cases, the administrative contract signed between the water operator and the local authority is accompanied with a set of rules defining, amongst others, how to deal with service complaints. In Madrid, for instance the Canal de Isabel II created in 2001 the office of the *Defensor del Cliente* (Customer Advocate), responsible for dealing with complaints made by water consumers. Thus, if a customer is not satisfied with the service given by the local company, or their complaint has not received an answer after two months, they have the alternative to pursue rectification and compensation from the company via the Customer Advocate, who is entitled to issue a mandatory decision for the water company.<sup>765</sup>

Whereas these discretionary mechanisms exist so consumers can raise their concerns directly to the water company, the Spanish regulatory framework includes more comprehensive means to sanction water providers if failures to honour the contract are identified. In particular, local authorities can fine water

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<sup>762</sup> Diputacion de Barcelona, "Reglamento Municipal Tipo Del Servicio De Suministro De Agua Potable Para Municipios," <http://www.ecourbano.es/imag/Reglamento%20tipo%20servicio%20suministro%20agua%20potable.pdf>.

<sup>763</sup> Ayuntamiento de Medina del Campo, "Reglamanto Del Servicio Municipal De Abastecimiento De Agua Potable," <http://www.ayto-medinadelcampo.es/NdSite/OnLineCache/FMS/98/85/f69b4f692f6458d8393fe70cf035878f/agua.pdf>.

<sup>764</sup> Ayuntamiento de Huesca, "Reglamento General Del Servicio De Suministro Domiciliario De Agua Potable Del Ayuntamiento De Huesca," [http://www.ayuntamientohuesca.es/\\_docum/reglagua.pdf](http://www.ayuntamientohuesca.es/_docum/reglagua.pdf).

<sup>765</sup> See Canal Isabel II, "Defensor Del Cliente," [http://www.cyii.es/cyii.es/web/atencion\\_cliente/defensor\\_cliente.html](http://www.cyii.es/cyii.es/web/atencion_cliente/defensor_cliente.html).

operators, suspend the contract or even severe the concession if it identifies that the water operator is failing to provide the service to the standards agreed.<sup>766</sup> In all cases, the local authority needs to initiate the proceedings against the water provider to enforce the contract. The greatest sanction – the end of the contract- requires the agreement of the majority of the local council members.<sup>767</sup>

If consumers continue to be dissatisfied with the service they receive from local water companies, they can initiate judicial proceedings in civil (not administrative) courts. The procedures are regulated in by the *Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil* (Law 1/2000, 7 January, on Civil Procedure), which makes general provisions on the civil court proceedings, defines the phases of the court hearings and make provisions on enforcement and provisional measures. Once the judicial decision is definitive, it is enforceable, and may entail an order to pay a fine or to carry out a specific performance. The decisions of the ordinary courts may be appealed at the *Audiencia Provincial* (Provincial Courts), which can examine the decision of the court both on its substance and formalities. The decisions of the Provincial Courts can be challenged by cassation at the *Tribunal Superior de Justicia* (Superior Court of Justice), whose decision can again be appealed at the *Tribunal Supremo* (Supreme Court) where judicial proceedings end.

As with administrative court procedures (seen further below) court fees apply. A tax to initiate the proceeding is charged – variable depending the type of

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<sup>766</sup> See articles 132 to 137, *Decreto De 17 De Junio De 1955, Por El Que Se Aprueba El Reglamento De Servicios De Las Corporaciones Locales*.

<sup>767</sup> Article 137, *Ibid*.

procedure (oral hearing, ordinary hearing or appeal), plus the fees for the legal representation. Legal aid is offered to those who can prove limited means, generally understood as those whose family income is less than twice the minimum monthly wage.<sup>768</sup>

Apart from measures against water providers, consumers may address their complaints to the local authority for the decisions that, as responsible bodies for the provision of water services, may have taken. Consumers that disagree with a decision can initiate internal administrative proceedings:

- The *Recurso Potestativo de Reposición* (or facultative appeal) is the mechanisms by which a consumer asks for the review of an administrative decision to the same body that took it. The consumer can initiate the appeal within a month after the decision is made.<sup>769</sup>
- Consumers may initiate a *Recurso de Alzada* (or appeal), which entails carrying out a complaint against a decision at the hierarchically superior body to the administrative department that took a decision<sup>770</sup>.
- The *Recurso Extraordinario de Revisión* (or appeal for special review) can be initiated only under certain circumstances:<sup>771</sup> the decision-making process has used false or mistaken information; new relevant information has been produced; the resolution had been issued as a result of malfeasance, bribery, violence, or other fraudulent conduct , etc.

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<sup>768</sup> Elena Merino-Blanco, *Spanish Law and Legal System* (London: Sweet & Maxwell, 2006), 134-35.

<sup>769</sup> Articles 107 to 113, 116 and 117. *Ley 30/1992 De 26 De Noviembre, De Régimen Jurídico De Las Administraciones Públicas Y Del Procedimiento Administrativo Común, Modificada Por La Ley 4/1999 De 13 De Enero.*

<sup>770</sup> Articles 114 to 115, *Ibid.*

<sup>771</sup> Articles 110, *Ibid.*



- The *Derecho de Petición* (or right to petition). All citizens have a constitutional guarantee to their right to “petition”, which means they are allowed to making requests to any public institution, government or authority.<sup>772</sup> The range of topics that can be brought up to the attention of the administration is wide, and includes any issue or matter within the competence of the recipient administration.<sup>773</sup>

Once these internal procedures have been exhausted, consumers may also initiate external proceedings to review an administrative decision. Spain has developed both non-judicial and judicial mechanisms to allow for a review of regulatory decisions concerning price setting and service quality standards. The Ombudsman and the Administrative Courts are the institutions with competence to review the decisions of local and regional governments.

The *Defensor del Pueblo*, or (National Ombudsperson) is position established by the Spanish Constitution, designated by Parliament and accountable to it.<sup>774</sup> The mission of the *Defensor del Pueblo* is the protection and defence of fundamental rights and civil liberties of citizens. S/He has the duty to ensure that the Administration and related organisations serve the general interest with objectivity and act in accordance with the constitutional principles of

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<sup>772</sup> Article 29, *Constitucion Espanola*.

<sup>773</sup> *Ley Orgánica 4/2001, De 12 De Noviembre Reguladora Del Derecho De Petición*. Certain local authorities may developed voluntary means facilitate the exercise of this right by adopting offices to deal with citizens' complaints and proposals. Such is the case, for instance, in Santander – see "El Ayuntamiento Relanza La Comisión De Reclamaciones De Los Ciudadanos," *El Diario Montanes*, 22 April 2010.

<sup>774</sup> Article 54, *Constitucion Espanola*.

efficiency, hierarchy, decentralization, coordination, and in subordination to the law.<sup>775</sup>

The *Defensor del Pueblo* can intervene in cases when an individual considers that the public authorities have not acted correctly<sup>776</sup>. Any person or association with a “legitimate interest” can file a complaint at the offices of the *Defensor del Pueblo* by mail, fax or online. The proceedings are free, as the *Defensor del Pueblo* does not charge for the complaints submitted. His/her jurisdiction extends to all bodies and authorities of the General Administration, of the Autonomous Communities and of the local governments. The *Defensor* may also intervene with those acting as agents or collaborators of any of these authorities in the performance or conduct of public utility purposes.

The decisions of the *Defensor del Pueblo* are not legally binding, but have a strong moral weight. The *Defensor*, although not competent to amend or repeal the acts and decisions of public administration, may nonetheless suggest amendments to the criteria used to produce them. Furthermore, when the *Defensor* identifies that a complaint refers to the services rendered by private parties (under administrative contract), s/he may request the competent administrative authorities to exercise their powers of inspection and sanction of the activities carried out by the operator<sup>777</sup>. In this sense, the *Defensor* can

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<sup>775</sup> Art 9.3, Ibid.

<sup>776</sup> *Ley Orgánica 3 / 1981, De 6 De Abril Del Defensor Del Pueblo, Modificada Por La Ley Orgánica 2/1992, De 5 De Marzo (Boe Nº 109, De 7 De Mayo De 1981 Y Nº 57, De 6 De Marzo De 1992.*

<sup>777</sup> Art 28, Ibid.

also intervene in cases when water services are delegated to a third party – a private or a public operator.

The appeals to the local authorities and the *Defensor del Pueblo* can be exercised along with judicial proceedings. The conditions for exercising the right to access justice in court are established in the *Ley 29/1998, De 13 De Julio, Reguladora De La Jurisdicción Contencioso-Administrativa* (Law 29/1998, of 13<sup>th</sup> July, on the regulation of contentious administrative jurisdiction) which is the Act that regulates the conditions and jurisdiction for administrative litigation in Spain.<sup>778</sup> This Act establishes that all decisions taken by public authorities have to comply with two main principles: legality and guarantee of protection of citizens' rights and interests.<sup>779</sup> Administrative courts control that these two principles are respected by public authorities – as such, they do not decide on how appropriate a measure might be. Thus, if citizens consider their rights to be breached, they can file a complaint in an administrative court within two months of the decision being taken.<sup>780</sup>

Citizens may initiate four different types of claims: (a) they may ask for the nullity of an act<sup>781</sup>, (b) for the a declaration recognising an existing situation<sup>782</sup>; (c) for a declaration that courts need to act<sup>783</sup>, (d) for a declaration that the administration must do something.<sup>784</sup> After the hearing, the court can refuse to

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<sup>778</sup> *Ley 29/1998, De 13 De Julio, Reguladora De La Jurisdicción Contencioso-Administrativa.*

<sup>779</sup> Título III, capítulo I, *Ibid.*

<sup>780</sup> Art 46, *Ley 7/1985, De 2 De Abril, Reguladora De Las Bases De Regimen Local.*

<sup>781</sup> Article 31.1, *Ley 29/1998, De 13 De Julio, Reguladora De La Jurisdicción Contencioso-Administrativa.*

<sup>782</sup> Article 31.2, *Ibid.*

<sup>783</sup> Article 32.2, *Ibid.*

<sup>784</sup> *Ibid.*

admit the claim<sup>785</sup>, estimate the decision<sup>786</sup>, or reject the case on its merits.<sup>787</sup> Although the administrative courts may invalidate a decision by the administration or decide on the scope of their actions, they cannot establish or propose the content of an act or administrative decision. The execution of the court decisions is compulsory. Against the decisions of the Administrative Courts, consumers can resort to Superior Tribunals of Justice, which are situated in each of the Autonomous Communities and have competences to deal with appeals against decisions by Administrative courts of the region. Against the decisions of the Superior Tribunal of Justice, consumers can make “appeal of cassation” and “appeals for revisions of decisions” at the Supreme Judicial Council, whose decision is final.

Access to justice is not free. Court fees are paid to file a complaint, except if the appeal is made by a non-for profit entity, or by organisations exempted from company income tax. However, legal aid is given to those with insufficient resources to plead, after analysing the personal finances and determining a threshold. If the appellant is within the threshold, legal aid is granted so they have not to assume the costs of the administrative procedure.<sup>788</sup>

Despite the existence of these mechanisms, national experts interviewed are not aware of cases brought to court or to the Ombudsman regarding decisions about water prices and customer standards. Consumer associations stress the little number of complaints for water tariffs and water quality from consumers.

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<sup>785</sup> Article 69, Ibid.

<sup>786</sup> Article 71, Ibid.

<sup>787</sup> Article 70, Ibid.

<sup>788</sup> Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union, "Administrative Justice in Europe - Report for Spain," (2009), [http://www.juradmin.eu/en/eurtour/eurtour\\_en.lasso?page=detail&countryid=7](http://www.juradmin.eu/en/eurtour/eurtour_en.lasso?page=detail&countryid=7).

While the regulatory system ensures that consumers can access justice when they consider their rights infringed, the actual cases when they have resort to judicial means are small in number.<sup>789</sup>

## 6. CONCLUSION

This chapter has analysed water governance in water services provision in Spain. It has examined the distribution of responsibilities for providing water services, identifying local authorities as the authority with responsibilities for the provision of drinking water and sewerage. This function is, however, frequently delegated to private or public operators, which thus become the organisations directly in charge of carrying out the service.

In analysing access to information, participation, and access to justice for water consumers, the chapter has shown how national regulations provide for the involvement of water consumers in the setting of water prices and service standards. Access to information is directed towards facilitating knowledge of final decisions the local authorities reach, but consumers have fewer guarantees regarding access to information during the decision-making process and to the documents employed to reach a decision. In terms of participation, the analysis shows that water consumers participate only marginally in the decision making process to set water prices and service standards, which is generally restricted to ratifying prices as participants of the Regional Price Commission. The national regulatory framework provides, nonetheless, for mechanisms to challenge decisions on water prices and water standards, via administrative courts and complaints to the Ombudsman.

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<sup>789</sup> Interviewee 12.

## COMPARISONS AND CONCLUSIONS

This research has aimed at developing an analytical framework to study and compare national governance mechanisms. It has argued that, to understand water governance, it is necessary to assess to what degree different national regulatory frameworks provide for access to information, public participation and access to justice, which have been considered the main principles of good governance. To do so, the research has analysed the national regulatory measures that ensure water governance concerning water tariff and customer standards setting in six European countries: England, France, Italy, the Netherlands, Scotland and Spain. It has developed 14 criteria for comparing the mechanisms developed at the national level to guarantee that water consumers have access to information, participate in decision-making process and can seek remedy if they consider that their legitimate rights have been breached.

What can be learnt from the comparison of these six countries? This chapter summarises the results of the analysis of water governance in the country cases. It is divided into three sections. Section 1 provides an overview of the characteristics of the countries analysed focusing on demography, natural resources data, allocation of responsibilities between different tiers of government and national actors, and management models. Section 2 compares the different mechanisms developed at the national level to set water prices and define consumers' standards. Finally, section 3 contrasts the means to

facilitate access to information, participation and access to justice across the countries analysed, according to the criteria developed in chapter 2.

Overall, this comparison highlights the existence of important variations in national services regulation across Europe. Even though the European Union has developed environmental and water quality standards applicable in all EU member states, the features characterising water service provision remain strongly national in character. The countries display strong discrepancies when it comes to how power is allocated amongst national authorities and how they manage services provision. Concerning water services governance, the analysis has revealed the existence of large variations in the mechanisms available to consumers to access to information, to participate and to access to justice regarding decisions to set water prices and service quality standards. Still, within this variation, the analysis establishes a typology of management frameworks by grouping together countries that have followed similar paths for water governance, and also identifies general trends that might influence future developments in water services provision.

## **1. CHARACTERISTICS**

The countries analysed in this report have different structural characteristics. Comparing key national data related to demography, water natural resources, management modes and the roles of public authorities, is instrumental to understanding the variation of conditions for water services provision in the six countries.

Regarding demographic data, the report has compared two large countries, i.e. France and Italy, with similar population size and number of households; two

medium size countries (Spain and England), and two small countries (the Netherlands and Scotland). They are all eminently urban countries, with a percentage of urban population oscillating between 66% in the Netherlands to 89% in England and Wales. These circumstances can influence the cost of providing the service: the more sparsely populated is a country – such as Scotland - the more expensive it is to supply drinking water and sewerage to its citizens.

**Table 5: Demographic data**

	England	France	Italy	The Netherlands	Scotland	Spain
<b>Total population</b>	49 million	60 million	58 million	16 million	5 million	42 million
<b>Urban population (%)</b>	89%	76%	67%	66%	68%	77%
<b>Number of households</b>	24 million	26 million	23,3 million	7 million	2,2 million	20,8 million

As for natural resources data, the services costs are likely to be greater when a country has relatively less abundant natural water sources, and when consumers' water demands are greater. In the countries analysed there are considerable differences in water availability per person per year in each of the countries, from the country with the least resources (England) to the country with the highest (the Netherlands). Water used per person/day shows large differences; the average Spanish consumer uses 250 litres/day, whereas the average Dutch consumer employs less than half of that amount -127 litres/day. The average water bill also oscillates markedly between the countries, from €227/year in Spain to €485/year in the Netherlands. This data disproves the generally held assumption that services costs are likely to be greater in countries with less access to natural water sources, and when consumers' water demands are greater.



**Table 6: Natural resources data**

	England	France	Italy	The Netherlands	Scotland	Spain
Water availability per person per year	2,392 m3 (UK)	3,284 m3	3,325m3	5,506m3	2,392 m3 (UK)	2,794m3
Average water use per person per day	146 litres	165 litres	250 litres	127 litres	143 litres	157 litres
Average water bill	£346.6/year	€305/year	€294/year	€485/year	£324/year	€227/year

Regarding the allocation of roles between public authorities, France, Italy and Spain have made the local authorities the primary responsible body in charge of providing drinking water and waste water services. In the Netherlands, this task is carried out by three types of national actors: local authorities are in charge of waste water collection; publicly owned companies provide drinking water services, and water boards are responsible for waste water treatment within their catchment areas. In Scotland, the publicly-owned Scottish Water is the company in charge of providing all water services. For its part, in England, 10 large water and sewerage companies – privately owned - supply all water services in the areas under their jurisdiction, whereas another 11 much smaller private companies ensure water supply in another 11 areas.

Other relevant authorities have an essential role to play in setting general policies and requirements. In all countries analysed, the national government intervenes to set environment and public health standards and guidelines following, EU law requirements, as seen in chapter 3. In addition, in the case of Spain, 17 regional authorities also act as water regulators, as they may impose further standards to those set by the national government and may impose caps to local water tariffs. In both Scotland and England, independent regulatory agencies for the water services – the WICS and OFWAT,

respectively –also assume responsibilities for of water services provision, including setting standards for the industry and monitoring and sanctioning the activities of water companies.

**Table 7 Allocation of roles between relevant authorities and public bodies**

	England	France	Italy	The Netherlands	Scotland	Spain
<b>Responsible body for drinking and waste water provision</b>	Department for Environment, Food and Rural Affairs	Local authority	Local authority	Local authorities for waste water collection	Scottish Government	Local authority
				Local and regional authorities for drinking water		
				Water boards, for waste water treatment		
<b>Other relevant authorities</b>	Environment Agency	Ministries of Environment, Health, Interior	Ministry of the Environment	National government	Scottish Environment Protection Agency	Ministry of the Environment
	Drinking Water Inspectorate				Drinking Water Quality Regulator for Scotland (DWQR)	
	OFWAT				Water Industry Commission for Scotland	17 Autonomous Communities

The analysed countries display different types of management for water services provision. In England, fully divested private companies are in charge of all water service provision tasks, from abstraction to waste water treatment. This contrasts sharply with the type of management prevalent in France, Spain and Italy, where municipalities or supramunicipal authorities can choose whether to provide the service directly, or to delegate it to privately or publicly owned operators. In these cases, public authorities own all infrastructures, but

are not necessarily in charge of giving the service. Finally, Scotland and the Netherlands have both developed similar management models; publicly owned companies carry out tasks as water suppliers, for the whole of the country in the Scottish case, or in different regions in the Dutch case.

**Table 8: Management models for water utilities**

	England	France	Italy	The Netherlands	Scotland	Spain
Types of operators active in the country	Private operators	Direct public management	Publicly owned operators	Publicly owned operators	Publicly owned operator: Scottish Water	Direct public management
		Publicly owned operator	Private operators under contract			Publicly owned entities
		Private operators under contracts				Private operators under contract
Infrastructure ownership	Private operators	Public authorities	Public authorities	Public authorities	Public authorities	Public authorities
						Private operators
Forms of public-private partnership	N/A	Operation and maintenance	Concession	N/A	N/A	Lease
		Lease	Public-private joint ventures			Concession
		Concession				Public-private joint ventures
		Public-private joint ventures				

## 2. WATER PRICE AND CUSTOMER STANDARD SETTING

The report has analysed how each of the countries set their water prices and their quality standards. Three approaches can be identified, hereby be referred to as the regulatory agency approach, the bilateral contract approach and the self-regulatory approach. Whereas England, Scotland, Italy and the

Netherlands follow exclusively one approach, two of them coexist in Spain and France.

- *Regulatory agency approach*

By means of this approach, a national independent body is responsible for setting a price cap on the maximum bill increases allowed to water providers. The regulatory agency approach for the water price setting is employed in England and Scotland. As seen in Chapters 3 and 7, the national governments in both England and Scotland set the general objectives and standards that the industry must attain, while national regulators analyse and benchmark the performance of the water operators who are in charge of providing the service. By doing so, water regulators are able to estimate the appropriate price limits they can impose to water companies. Their statutory obligations are both to set price limits that enable water companies to carry out their functions to the required standards and ensure their financial sustainability, and to control that water companies do not abuse their monopoly power.

- *Bilateral contract approach*

The bilateral contract approach is employed in certain municipalities in France, Spain and Italy, when the local authority delegates water provision to a third party – either a privately or a publicly owned water company. The contract is a document that stipulates the conditions for the provision of the service, including the charges imposed to consumers, and also the characteristics of the service that they will receive. The conditions for service provision are agreed by the signatories. Their degree of discretion is limited by minimum legal requirements related to service characteristics, as well as environment and public health standards. The report has also shown that other bodies may have

a final say about the contract signed between local authorities and water operators. In the case of Spain, for instance, the Regional Price Commissions need to ratify the increase in water tariffs decreed by local authorities and agreed by contract with water operators.

- *Self-regulatory approach*

In certain cases, the authorities responsible for providing water services can define the procedures to set water prices and customer standards. When water services are provided directly by local authorities in France or Spain, the departments in charge of services provision set water charges and service standards internally, subject to annual ratification at council meetings. Similarly, in the Netherlands, the drinking water authorities, the local authorities and the water boards set their water charges and service standards by following their respective internal procedures. National regulations define minimum requirements for water service provision (either in relation to the procedure to be followed or in relation to the substance of their decision), but responsible bodies (the local authorities in France and Spain, plus the regions and water boards in the Netherlands) decide to a large degree how they are to provide their services. The entities legally responsible for providing drinking water and wastewater services to the population retain wide discretionary powers to decide on the prices and the standards of their services to consumers.

### 3. COMPARISON OF WATER SERVICES GOVERNANCE CRITERIA

This research has developed an analytical framework to compare the regulatory frameworks for water governance in water services provision across the six selected countries. Chapter 2 identified a list of 14 indicators for

access to information, public participation and access to justice, which have been employed to liken and contrast national legal mechanisms across the countries. The sections below summarise the findings of previous chapters. Countries with similar approaches to water price and service quality standards settings are frequently grouped together, as the mechanisms that they have developed for governance in water service provision are comparable.

### **3.1. ACCESS TO INFORMATION**

Chapter 2 identified four elements to compare to what extent the national regulatory framework of the six countries provides for access to information on the setting of water price and quality of service standards. Whereas the adoption of the Directive 2003/4/EC on public access to environmental information has contributed to assert pressure on relevant authorities about the need to collect and make available information related to water quality, the measures put in place in the countries vary markedly. The four criteria are the following:

1. Regulatory documents are in the public domain so that consumer can have access to them
2. Tariff setting process and the quality service procedure is regulated so that the consumers know how it works
3. Decisions published so that consumer can have access to them
4. Reasoning behind decisions published so that consumer can access to them
5. Mechanisms exist for consumers to request information if it is unavailable

#### **1. *Regulatory documents in the public domain***

The national legislative frameworks of the countries-cases provide for different degrees of availability of regulatory documents. Regulatory documents are reports that provide information that relevant authorities employ to reach a decision on water price and customer standards, such as information on capital expenditure and operational costs, future investments, revenues, etc. as well as information on the functioning of the service – leakage, environmental information, water quality, etc.

The analysis has shown that Scotland and England are the countries that give more comprehensive information to consumers. The independent regulatory agencies in each country, the WICS and OFWAT, publish regular reports with the information that water companies supply. With the exception of certain information enjoying commercial confidentiality status, most of the collected evidence on the water service provision can easily be accessed by internet and hard copies, and tend to be easy to understand. In addition, both countries have adopted Freedom of Information Acts, so consumers can ask to have access to information if it is unavailable to them. In this sense, access to information is not only possible thanks to the publication of reports, but also by means of mechanisms that protect the exercise of this right.

The Netherlands also provides large amount of information to consumers on the activities of drinking water authorities. The association of drinking water companies VEWIN publishes regular information on the activities and performance of their affiliates, although not to the detail and the exhaustive degree present in the Scottish or English models. The Netherlands has also a long history of disclosing information to consumers, as a result of its long-standing Freedom of Information Act, which has created duties to issue

information upon request by citizens. Local and regional authorities, as entities with the legal responsibility for ensuring the provision of water services, are required to provide information on the policies and plans in their area of jurisdiction.

As for France and Spain, the information made available depends largely on the approach to water services setting at the local level. When local authorities delegate the service to a water operator, they negotiate a service contract, which is a public document, available to consumers. By consulting this document, consumers may have access to a variable degree of information about the water service they receive – information on prices, volume of water distributed, possible plans for investment, etc. In addition, local authorities in both Spain and in France are required to inform the local council annually about any increase in water tariff or change in consumer quality standards, which may also facilitate the access to information to consumers. Similarly, in Italy, the legislation gives ATOs the general responsibility to collect and disseminate information to all consumers. Therefore, national legislation in these countries does not specify what information local authorities need to be made available. The published information generally concerns water consumption and tariffs, but little information is distributed on investment plans, past activities, etc.

When French and Spanish local authorities provide services directly, consumers can access information on the service they receive in the annual reports of the activities and budget of the local authorities, as well as by any voluntary measure that the local authority may carry out with the objective of providing information on relevant information in their website, bills, etc.



National regulations require local authorities to give publicity to final decisions. However, there are no legal requirements that oblige local authorities to issue information about the evidence they employ to reach their decisions. For this reason, the information that local authorities make available for consumers, when it exists, is not necessarily comparable across either Spain or France. This circumstance hampers the evaluation of the functioning of different operators and municipalities.

## ***2. Tariff setting process and the quality service procedure is regulated***

Only the English and Scottish regulatory frameworks make specific reference to the need to regulate the tariff and the service standards procedures. The mechanisms to set water prices and quality standards are defined by the economic regulators in each country – the WICS and OFWAT – regularly every 5 years. In the rest of the cases, the procedures to set water prices meet certain characteristics established at the national level, but are generally at the discretion of the relevant authorities. In Italy, the national government has established a “normalised method” for water prices, which includes the factors that ATOs need to consider to set the price and to update it regularly. The values given to each of the elements of the tariff are established independently by each ATO Authority. In France and Spain, national laws require that the tariff is passed by the local councils. However, no major requirements are made about how local authorities have to set the price, or the structure of the tariff, or the standards of service quality that they need to ensure (apart from those deriving from EU law). Similarly, in the Netherlands, the procedures to set the tariff and the quality of service standards are not established by law. The drinking water companies are only required to ensure that they function in a reasonable, transparent and non-discriminatory manner.

**3. *The decisions are published so that consumer can have access to them***

All the countries have introduced provisions to ensure the publication of their decisions. The final decisions are generally published in official documents at the national, regional or local level (as in the cases of France, Spain and Italy), or by the regulation agency (as in Scotland and England) after a period of consultation. In the Netherlands, local and regional authorities and water boards are obliged by law to publish their decisions on tariffs and service quality so consumers can have access to them. Drinking water companies also publish their decision both within their regions and through the association to which all water companies belong.

**4. *The reasoning behind decisions is published so that consumer can have access to it***

No country has included an all-embracing obligation on public authorities to provide information on the reasoning behind their decisions. Some *de facto* variations exist. The Scottish and the English consumers have generally better access to information on the reasons that support a particular decision on water tariff or consumer standards than the rest of consumers. Most consultation procedures in these countries include the active obligation to respond to issues raised by consumers and all relevant authorities have to justify their decisions regarding price caps, environmental or service quality standards. Such is not the case in either France, Spain or Italy. Although the publication of decisions is a requirement in all these countries, none of them has created obligations to provide explanations for the adoption of a particular decision concerning water price or customer standards. This is also the case in the Netherlands, where, although comprehensive information is given to

consumers on the performance of the water companies on voluntary basis, scarce information is generally available to understand the reasoning behind a particular decision.

**5. *Mechanisms exist for consumers to request information if it is unavailable***

Four of the six countries (England, Scotland, France and Italy) have specialised bodies in place to deal with requests for information, if this is unavailable in the public domain. The Information Commissioners in England and Scotland, the *Commission d'Accès aux Documents Administratifs* in France, and the *Commissione per l'accesso ai documenti amministrativi* in Italy deal directly with citizens that request for disclosure of information from public authorities. These countries have adopted specific legislation for access to administrative legislation, articulating the citizens' "right to know". In these cases, even when information is not in the public domain, consumers can receive response to their requests for particular information directly from these specialised bodies.

Neither the Netherlands nor Spain has a Freedom of Information Commission to oversee citizens' demands for information. In the case of the Netherlands, disputes concerning freedom of information have been resolved by appeals to arbitration and ordinary judicial courts, which have interpreted the particular cases in light of the provisions of the Dutch Freedom of Information Act. The situation in Spain is contrary to that in the Netherlands; in Spain, no legislation on the freedom of administrative information has been adopted to facilitate access to information to consumers on activities carried out by public authorities. No specialised body exists either to deal with requests for disclosure of public information.

### 3.2. PUBLIC PARTICIPATION

Four different criteria were identified regarding the opportunities available to consumers to participate in the decision-making process to set water prices and customer standards. This includes:

6. The regulatory framework guarantees the right of consumers to participate in price and customer standards setting
7. The regulatory framework allows for participation of consumers in the spheres of investment, operation, pricing, and service quality
8. Consumers can participate in multilateral stakeholders meetings: for co-decision, consultation or opinion for water price and water standards setting
9. Consumers have the right to receive feedback so that they can understand to what extent their views are taken into account

*6. The regulatory framework guarantees the right of consumers to participate*

*7. Consumers participate in the spheres of investment, operation, pricing, and service quality*

Consumers' right to participate is guaranteed to various degrees in the regulatory frameworks of the countries analysed. England and Scotland favour the involvement of consumers associations for tariff setting and service quality standards agreements. In France, participation of consumers is ensured in the local Consultative Commissions, which operate exclusively in medium and large size towns. These Commissions may issue opinions on water tariffs and service standards – depending on the particularities of their internal operational charter. In Spain, consumers have the right to participate in the meetings of the Regional Price Commissions, which ratify water prices, but no legal procedure is envisaged to guarantee their contribution to the definition of service standards.

The opposite occurs in Italy, where provisions exist to guarantee that consumers are consulted when deciding on the quality of service given to consumers, but no such guarantee is found in the provisions for the setting of water tariff. Finally, in the Netherlands, no legal provision to facilitate direct consumers' participation has been identified for either the setting of the water tariff or the service quality standards.

#### ***8. Consumers can participate in multilateral stakeholders meetings***

The input of consumers in the decision making process is generally limited, even in the countries where their participation is guaranteed by law. Such is the case in England and Scotland, where consumers can intervene by providing their opinion in consultations initiated by water regulators and the government. Equally, both in France and Italy, consumers have an advisory role in the local consultative committees, as their participation is restricted to informing about their preferences on standards of the service quality. It is only in Spain that consumers have a more decisive role as members of the Regional Price Commissions. The make-up of these Commissions, which are established to watch over local public prices, demands the creation of strong coalitions between consumer representatives and other participants in order to adopt decisions reflecting their interests. Finally, in the Netherlands, where consumers' participation is not regulated by law but developed on voluntary basis by water companies, consumers may be consulted for the setting of water tariffs and the standards for service quality.

#### ***9. Consumers have the right to receive feedback***

The report has shown that legal provisions ensuring that consumers have the right to receive feedback only exist in England and Scotland. In all other cases,

the national law does not refer to whether consumers are entitled to receive feedback on their contributions to the consultation. It is at the discretion of sub-national authorities and water operators to provide feedback to the consumers.

### **3.3. ACCESS TO JUSTICE**

Finally, the report has employed five criteria to compare the national mechanisms to access to justice in the countries considered. It has distinguished between non-judicial and judicial measures to access to justice, which can be initiated by water consumers against the water service provider (either a delegated company or a local authority operating the service directly) or against a relevant authority in charge of ensuring that the service works effectively. The criteria are the following:

10. Consumers can initiate non-judicial proceedings against water services providers (either the responsible body directly or a contracted water operator) if it fails to perform its duties
11. Consumers can initiate non-judicial proceedings against relevant authorities if they fail to perform their duties
12. Consumers can initiate judicial proceedings against water services providers (either the responsible body directly or a contracted water operator) if it fails to perform its duties
13. Consumers can initiate judicial proceedings against relevant authorities if they fail to perform its duties
14. Consumers have to assume financial costs of bringing cases to court

### ***10. Consumers can initiate non-judicial proceedings against water services providers***

Several types of non-judicial proceedings exist in the countries analysed to review decisions on tariffs and service quality standards. The research has distinguished between internal procedures – those that are initiated within the organisation setting the tariffs and the service standards – and external procedures, which entail the mediation of other organisations to bring solutions to disputes.

Regarding internal proceedings to review decisions, the report has shown that some of the national regulatory frameworks contain provisions to invite discontented consumers to address their complaints to the water operators when service provision is delegated. Such is the case in England, Scotland and Italy, where regulatory provisions exist to define how water consumers should address first their water operators for issues concerning the service they receive, or for complaints regarding water bills they have imposed. In addition, the English and Scottish cases have developed a unique system of guaranteed standards of service. By their virtue, consumers are guaranteed to receive certain standard of service or an automatic compensation when companies fail to honour such standards, without having to initiate appeals.

In Spain and France, local authorities may set service standards that water operators need to meet, including how to deal with complaints, but no national provisions exist to regulate how consumers should initiate complaints against the water service provider - either the local authority directly, or a contracted water company. In this sense, it is therefore the responsibility of the different water operators to define the means, if any, for an internal procedure. Such is

the case also in the Netherlands, where the internal mechanisms to complain against the water companies are established by the water companies themselves.

As for external non-judicial proceedings, all countries have established means to exert control on the water companies that provide the service. In England and Scotland, the national consumer associations – CCWater and WaterWatch - have powers to mediate with the water company to try to bring a solution to a problem about the service provided. In addition, consumers have also the possibility to ask the economic independent regulators – OFWAT and the WICS – to review decisions taken by water companies regarding water prices and service standards. In this sense, consumers can bring forth the failures in the service to the attention of the regulators individually or via the consumers associations.

The Netherlands and Italy have developed very distinctive mechanisms for external non-judicial review of the decisions taken by drinking water companies, by mediation of, respectively, the Arbitration boards and the Chambers of Commerce. Initiating appeals to these bodies is generally simpler, faster and more direct than judicial reviews. The decisions of these bodies create enforceable agreements with which water companies need to comply.

As for France and Spain, when the provision of water services is delegated to a third party, the responsibility to ensure that the water operator performs to the agreed standards belongs to the local authority or to the supramunicipal entity in charge of giving the service. They need to ensure that the water companies supply drinking water and manage sanitation to the standards agreed by contract, and to issue sanctions when they have not done so. In Spain, although



water companies may be penalised for failing to perform resulting from consumers-led initiatives, no national regulation exists to indicate the mechanisms available to consumers to initiate non-judicial proceedings against failing water companies. The procedures for complaints, and the possible sanctions that may derive, are decided by the local authorities. Equally, in France, water companies may be sanctioned as a result of consumers-led initiatives depending on the condition of service contracted between the local authority and the water operator. The recent establishment of the *Mediateur de l'Eau*, which can intercede in conflicts between consumers and water operators, may provide more uniformity to the penalties issued against water companies across the country. In any case, like in the Spanish case, national regulations do not specify the sanctions that should accompany local water operators' failures to perform.

#### ***11. Consumers can initiate non-judicial proceedings against relevant authorities***

All the countries have developed non-judicial mechanisms to review decisions taken by public administrations in charge of setting general policies, plans or requirements concerning all the water utilities. As with the measures against the water service provider, they can be both internal and external.

Regarding internal measures, Italy, France, Spain and the Netherlands have defined mechanisms that water users can initiate against the decisions of all tiers of the administration that set general policies, plans or requirements concerning water services. Consumers in all four countries can challenge an administrative decision both before the same organisation that has taken the decision, and its hierarchically superior body. These appeals seek to ensure that the relevant

authorities reconsider their decisions and, if it is considered appropriate, they overrule them in light of information and the concerns raised by the affected consumers. Scotland and England have also means to ensure that consumers can initiate internal procedures to complain about the regulators' standards of service. The WICS, OFWAT, DEFRA and the Scottish Executive have developed separate ways and guidelines to deal with concerns that citizens may want to raise, and have put in place internal complaint procedures aimed to review the handling of particular cases.

As for external measures to ensure the accountability of the relevant authorities, a crucial figure in all countries is the Ombudsperson. The Ombudsperson is appointed by public authorities with the objective to settle disputes between water consumers and public administrations. In all countries but England and France, the Ombudsperson can be directly contacted by consumers.

In England, consumers that disagree with the decision by the CCWater, OFWAT or DEFRA can ask for the involvement of the *Parliamentary and Health Service Ombudsman*, which can mediate to resolve the issue. To do so, consumers need to contact first their MP, who then asks the Parliamentary Ombudsman to initiate the case against a public authority. The Parliamentary Commissioner investigates complaints against government departments, which can result on a public rebuke on the activities of the public authorities and a request for modification of the decision. Similarly, the *Mediateur de la Republique* in France has comparable competences as the Parliamentary Commissioner. As the English Parliamentary Commissioner, the Mediateur does not deal directly with the affected consumers, but considers exclusively the cases raised by

parliamentary representatives, who act as mediators between the consumer and the *Mediateur*.

In the Netherlands, the *Nationale Ombudsman* is also in charge of supervising the activities of the administration, when internal procedures fail to bring about satisfactory outcomes for consumers. Likewise, in Spain, the *Defensor del Pueblo* is in charge of overseeing the activities of the public administrations, at the instance of a consumer's complaint against the service provided by local authorities. For its part, Italy does not have only one national Ombudsperson operating at the national level, but over 640 local and provincial *Difensore Civico*. These bodies have the responsibility of dealing with complaints made by consumers against the performance of the administration operating within their jurisdictions.

Scottish consumers have the greatest facilities to hold public administration accountable. The *Scottish Public Services Ombudsman* can receive direct complaints from consumers about the activities carried out by the WICS and the Scottish Executive, without the intervention of a Scottish MP to course their complaint. In addition, consumers may ask for the intervention of the Scottish Executive when they disagree with a decision made by the economic regulator. The Scottish Executive can review the WICS's decisions on issues regarding inappropriate procedures, but not regarding policy objectives. Further to this, the Scottish Parliament has the specific duty to investigate complaints made in respect of any action taken by or on behalf of a member of the Scottish Executive in the exercise of functions conferred on the Scottish Ministers, or any other office-holder in the Scottish Administration.

## ***12. Consumers can initiate judicial proceedings against water services providers***

All countries analysed have developed judicial procedures to bring water operators to justice. Appeals to court have, in the cases of England and Scotland, an extraordinary nature. The British regulatory frameworks have favoured non-judicial means for review of the water companies' acts so judicial reviews are considered a last resort. Such is the case for the Netherlands as well, which has favoured internal procedures and arbitration boards over judicial proceedings to deal with disputes over water tariff and service standards.

As for the rest of the cases, the report has found that, when the service is delegated, consumers in Italy, France and Spain can bring the water operator to civil courts if they consider that their water company fail to provide the service to the standards and at the price contracted. The reported cases have concerned excessive bills due to leakages and failures to inform on water tariffs. These cases are dealt with as ordinary breaches of contract between the consumers and the water companies. On the other hand, when French or Spanish local authorities provide the service directly, the judicial proceedings available to consumers are not carried out in ordinary courts, but in administrative courts, which specialise on disputes in the exercise of public powers – and follow proceedings explained in the section below. In the Italian case, the report showed how the boundary of responsibilities between water companies and the ATO Authorities has been contested in various cases, which has required the intervention of the Appeal Courts to decide whether the ordinary or the administrative court has jurisdiction over the particular disputes brought up.

## ***13. Consumers can initiate judicial proceedings against relevant authorities***

The report has found that in all countries consumers can initiate judicial actions if they consider that relevant national authorities fail to perform their duties.

Indeed, in England, public authorities may be brought to court for maladministration or misconduct by the public organisation. Any “interested party” may a judicial review against OFWAT and DEFRA, if they consider that the administration is not fulfilling their obligations appropriately. As a result of this initiative, the tribunals may decide to revoke a decision and to issue a sanction for maladministration. Similarly, in Scotland, consumers are entitled to initiate judicial review in cases of breach of duty, *ultra vires* or unreasonable or irrational decisions made by public authorities.

Such is also the case in the Netherlands, where consumers can initiate proceedings to sanction public authorities, i.e. local authorities, regions and water boards, if they fail to meet their obligations as responsible bodies for the provision of water and sewerage services. The administrative courts may hold public authorities accountable for failures to meet their obligations, as a result of direct complaints and appeals directed by water consumers.

Administrative courts are also involved in France, Spain and Italy, where consumers can initiate proceedings against the local and supramunicipal authorities for their decisions, if they consider them unlawful, negligent or against their legitimate rights.

#### **14. Consumers have to assume financial costs**

The costs of bringing cases to court vary from country to country. Court fees apply in England (oscillating from £30 to £200), Netherlands, Italy, Scotland

and Spain (in this last case, with certain exceptions). Since 2004, the stamp duty applicable in France for the initiation of court proceedings is no longer applied in France, so France is the only country where court fees do not exist.

Regarding proceedings costs, legal aid is available in all countries to help to cover legal proceeding fees. To discern who is in need of such legal aid, all the countries have developed means tests and have defined a threshold under which legal aid is conceded. This assistance excuses beneficiaries from paying the legal fees, either totally or partially, depending on the cases.

#### **4. GOVERNANCE IN WATER SERVICES PROVISION**

This analysis has shown the marked cross-national differences in water services governance. National regulatory frameworks provide for very different mechanisms to increase transparency, direct participation for consumers and access to justice.

Within these differences, some likeness can also be found among countries that employ similar approaches to set their water price and their service quality standards – a regulatory agency approach, a contract approach and/or an internal approach. These approaches rest on different assumptions on how citizens' interests are reflected in public authorities' decisions and, thus, countries with similar approaches have developed analogous responses to facilitate access to information to consumers, to facilitate public participation and to ensure access to justice. In general terms, when service has been delegated to a third party, there has been an increased demand for mechanisms to access to information, public participation and access to justice

for water consumers, in order to counteract the loss of control by public authorities over the day to day water service provision.

Thus, regulatory agency approaches, such as in England and Scotland, have favoured more access to information and provide more opportunities for participation to consumer associations than other approaches. Regulatory agency approaches have seemed more inclined to allow for an informed consultation of consumers' interests in the decision making process to set water prices and quality standards. Consumers have benefited from a set of uniform national rules defining their rights to information and the instances and scope for participation. However, once a decision has been taken, the opportunities to redress it and to modify it become more restricted – particularly when it entails the intervention of an external body - with only companies being capable to ask for a review of the decision. Water consumers do nonetheless have access to means to ensure the enforcement of the standards and water price caps set.

In cases when countries have contracted out the services either to public or private companies, the delegator – in most cases, the local authority - is the representative of the interests of consumers/citizens. When the service is delegated, local representatives have to ensure that the water operator complies with all minimum service standards and with environmental and public health requirements. In Spain, France and Italy, where local (and supramunicipal) authorities have frequently contracted out water service provision, concerns have been raised regarding the degree of control that the local authorities exert over the water operators. Improving the mechanisms for access to information, public participation and access to justice for consumers

have been justified as means to increase the degree of accountability of water operators and to provide opportunities to ensure that operators' activities reflect the preferences of users.

The report has pointed to the existence of differences between the local and supramunicipal that have employed a bilateral-contract approach to water regulation, both within a country and between countries. The legislative provisions to facilitate information transparency, public participation and access to justice have varied significantly. This is the case even where national regulations have aimed at standardising the requirements imposed to local authorities on customer service standards and water pricing - significantly in Italy, but also in France and Spain.

Despite these variations, certain common features exist. Access to information has most regularly depended on the publication of the contract between the responsible body and the water operator, and on the existence of regular sessions for public scrutiny of the water operators' activities. Public participation has been limited, and usually restricted to the setting up of consultative groups to take account of the preferences and opinions of consumers associations. Access to justice focused on ensuring the enforcement of the contract by water operators and relevant authorities, although given the difficulties and the costs of initiating judicial proceedings, access to justice by water consumers is not prevalent.

Finally, in the self-regulatory approach – that is, when responsible bodies supply drinking water and sewerage services directly - the information given to consumers and the opportunities to participate in the decision-making



process and the mechanisms to access to justice have been more limited. In the analysed cases, French and Spanish local authorities have a democratic mandate to provide local water services, which has given them the legitimacy to operate as responsible bodies with reduced input from consumers.

Even in these cases, local authorities have developed mechanisms to facilitate the involvement of local users by informing them about the service they provide, involving consumers in consultation procedures and guaranteeing mechanisms to challenge decisions in administrative courts. Whilst significant differences exist between the local authorities within a country, the report has found that, in cross-national comparative terms, these mechanisms have been prevalent in French local authorities than in Spanish local authorities. Indeed, the report has found that the French national regulatory system has introduced stricter standards for information transparency, public participation and access to justice than Spain, where these measures have been more contingent on local authorities' decisions.

In this context, the comparison shows that although ownership and delegation of water services provision are important factors in shaping the features of national water services governance, they do not determine what legal provisions a country develops to allow consumers to access to information, to participate in decision-making processes and to access to justice at the national level. Indeed, the report has shown, for instance, how two countries at the opposite ends of the ownership spectrum (England and Scotland) have developed similar mechanisms for water governance. Contrariwise, countries where the private sector is involved in water services management, such as

Spain and France, have developed dissimilar mechanisms to ensure the involvement of consumers in setting water tariffs and customer standards.

In this sense, the present report advocates a more nuanced analysis in order to understand governance in water services provision, beyond indiscriminate assumptions on the consequences of particular management and ownership solutions. The present report has provided a list of key criteria to take into consideration in the evaluation and comparison of different national governance regimes. Employing the criteria has proven to be a useful instrument to assess how very different countries facilitate the involvement of the water consumers into key decision-making processes.

## **5. FURTHER RESEARCH**

Water services governance is a large subject area. This report has contributed to the detect and compare existing practices at the national level and hopefully generated valuable understanding into the main legal features that allow public participation, access to information and access to justice at the national level. In doing so, the research as also suggested further topics for research and analysis. In particular, three large areas of future research are briefly discussed here.

Most immediately, future research may wish to test the analytical framework in other national jurisdictions, and to explore to what extent the criteria are applicable and informative to diagnose water service governance in different contexts.

In addition, this research has focused on formal mechanisms for water governance in water services provision. Future researchers may want to consider to what extent these national mechanisms take actual effect. Questions regarding to what extent consumers actually exercise their rights to access to information, participation and access to justice, as well as to identify the reasons why consumers may feel more or less inclined to do so, constitute a large research area. Particular attention may be given to analysing what institutional features facilitate a higher degree of participation at different tiers of government – local, regional and national.

Other venues for research may also be on the analysis of the impact of governance on policy decision-making. In particular, future research project may want to analyse the impact of greater transparency, public participation or access to justice on a range of diverse factors such as water tariffs and investment, or upon the political legitimacy of the decision-making bodies across time or across different jurisdictions.

## **INTERVIEWEES**

Twenty five non-attributable interviews were carried out with experts from all analysed countries.

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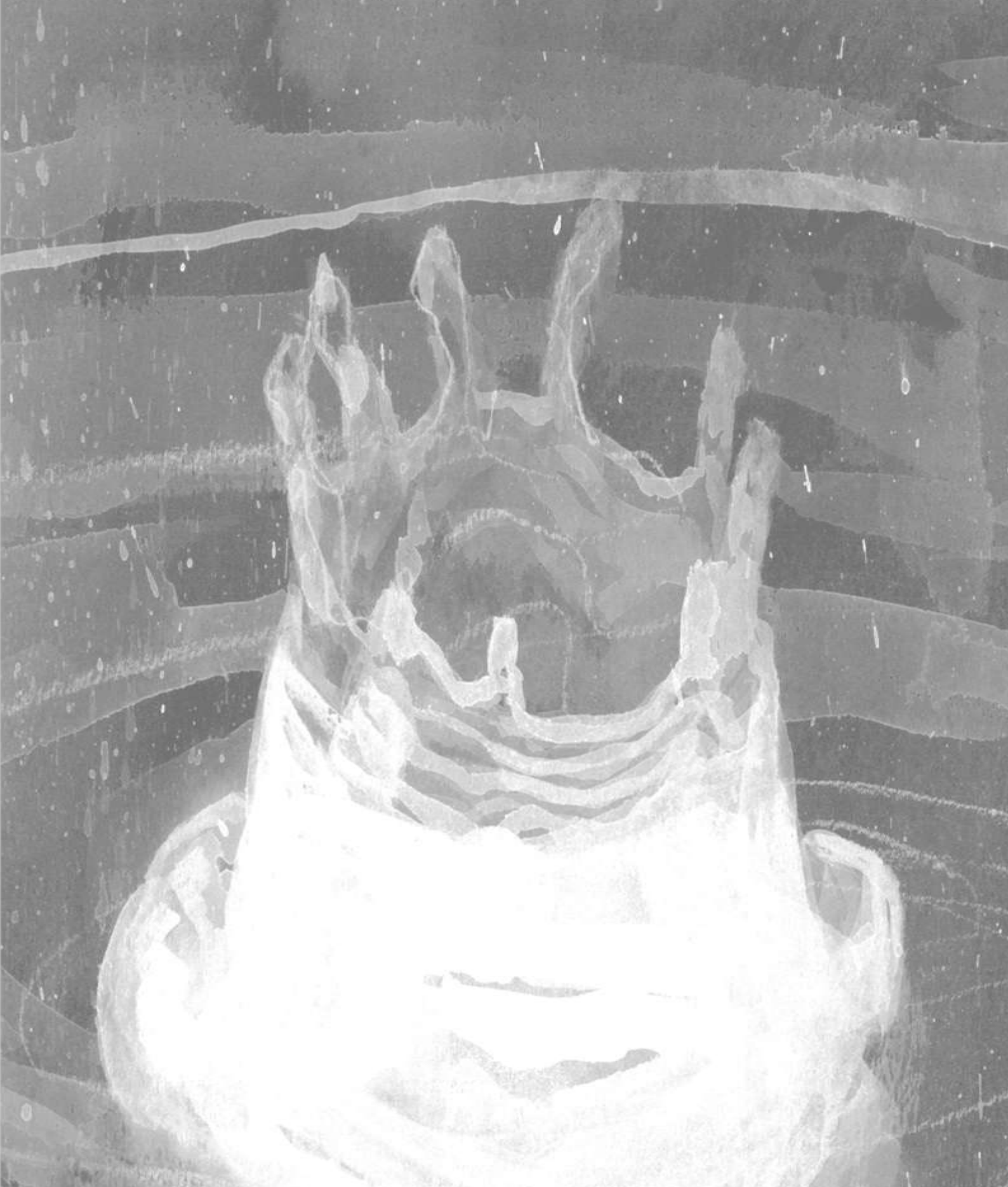
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